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IN THE

Supreme Court of the United States

THE CLEARING HOUSE ASSOCIATION L.L.C.,
Petitioner,

—v.—

BLOOMBERG L.P. and THE BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Exemption 4 of the Freedom of Information Act authorizes a federal agency to withhold "[1] trade secrets and commercial or financial information [2] obtained from a person and [3] privileged or confidential." 5 U.S.C. § 552(b)(4). The Second Circuit ruled that this exemption does not authorize the Board of Governors of the Federal System (the "Board") to withhold reports disclosing the identities of banks that obtained loans through the Federal Reserve System, along with the amounts and durations of such loans. In doing so, the Second Circuit held that (1) the highly confidential bank information in these reports was not "obtained from" the borrowing banks; and (2) the Board could not withhold this information on the basis that its disclosure would impair the effectiveness of its lending programs.

The questions presented are:

1. Whether the identity of, and highly confidential terms on which, a third party transacts with a federal agency is information "obtained from" that party and, therefore, within the scope of FOIA Exemption 4?

2. Whether information is "confidential" under FOIA Exemption 4 when its disclosure would impair the effectiveness of federal agency programs?

LIST OF PARTIES AND RULE 29.6 STATEMENT

The petitioner is The Clearing House Association L.L.C. The respondents are Bloomberg L.P. and the Board of Governors of the Federal Reserve System.

The Clearing House Association L.L.C. has no corporate parents, and no publicly-held company owns 10% or more of the stock of The Clearing House Association L.L.C.

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ON PETITION FOR A WRIT OF CERTIORARI
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PETITION FOR A WRIT OF CERTIORARI

Petitioner The Clearing House Association L.L.C. ("The Clearing House")[1] respectfully petitions

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[1] Established in 1853, The Clearing House is the United States' oldest banking association and payments company. It is owned by the world's largest commercial banks, which collectively employ 1.4 million people in the United States and hold more than half of all U.S. deposits. The Clearing House Association is a nonpartisan advocacy organization representing through regulatory comment letters, amicus briefs, and white papers the interests of its member banks on a variety of systemically important banking issues. Its affiliate, The Clearing House Payments Company L.L.C., provides payment, clearing, and settlement services to its member banks

(footnote continued)

for a writ of certiorari to review the March 19, 2010 judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The decision of the Second Circuit is reported at 601 F.3d 143. The orders of the Second Circuit denying rehearing are unreported. The decision of the District Court is reported at 649 F. Supp. 2d 262.

JURISDICTION

The Second Circuit entered its judgment on March 19, 2010, and denied the Board's and The Clearing House's petitions for panel and *en banc* rehearing on August 20, 2010. By orders dated August 27, 2010, the Second Circuit granted the Board and The Clearing House a 60-day stay pending the filing of a petition for a writ of certiorari. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The statutory provision involved is Exemption 4 of the Freedom of Information Act, 5 U.S.C. § 552(b)(4).

(footnote continued)
and other financial institutions, clearing almost $2 trillion daily and representing nearly half of the automated clearing-house, funds-transfer, and check-image payments made in the U.S. *See* www.theclearinghouse.org (last visited on Oct. 20, 2010).

STATEMENT OF THE CASE

The Second Circuit's decision below, which openly split with the D.C. and First Circuits, stems from an unprecedented FOIA request by Bloomberg L.P. ("Bloomberg") demanding that the Board of Governors of the Federal Reserve System (the "Board") disclose highly confidential reports containing the identities of banks that borrowed from the Discount Window (a permanent lending program of the Federal Reserve Banks) during the recent financial crisis, along with the amounts and durations of such loans.[2]

Bloomberg's request is unprecedented because, since the establishment of the Discount Window program in 1914, the Board has never disclosed the identities of borrowing banks or the loan-by-loan details of their borrowings. (The Board has historically published such information weekly on an aggregate basis.) That longstanding policy of borrower confidentiality rests on the recognized concern that depositors, counterparties, and market participants may infer (perhaps erroneously) that a bank that borrows from the Discount Window is

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[2] The request also demanded that the Board disclose such information for the now-discontinued Primary Dealer Credit Facility ("PDCF"), Term Securities Lending Facility ("TSLF"), and Term Auction Facility ("TAF"). Under the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act"), Pub. L. No. 111-203, 124 Stat. 1376 (2010), the Board will be required to disclose transaction-level details of loans made through the PDCF, TSLF and TAF, including the identities of borrowing entities, on or before December 1, 2010. *See* Dodd-Frank Act § 1109(c). Accordingly, the portion of this case about those facilities will be moot as of that date.

experiencing liquidity problems and react by withdrawing their funds from the bank or discontinuing to extend credit.

The Dodd-Frank Act now requires the Board to disclose the identities of banks that borrow from the Discount Window, along with other transaction-level details of their borrowing, approximately two years after such borrowing occurs. *See infra* at 12-13. But the Act does *not* require the Board to disclose information concerning Discount Window lending that took place prior to the Act's enactment. Allowing the Board to withhold this pre-enactment Discount Window lending information is important, because disclosure of this information threatens to harm the borrowing banks by allowing the public to observe their borrowing patterns during the recent financial crisis and draw inferences—whether justified or not—about their current financial conditions. *See infra* at 10-11.

The Board here sought to protect this pre-enactment Discount Window lending information by invoking Exemption 4 of the Freedom of Information Act ("FOIA"), which authorizes a federal agency to withhold "[1] trade secrets and commercial or financial information [2] obtained from a person and [3] privileged or confidential." 5 U.S.C. § 552(b)(4). Numerous circuit courts have held that information is "confidential" when its disclosure is likely "(1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained." *Nat'l Parks & Conservation Ass'n* v. *Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974) (footnote omitted). The D.C. and

First Circuits have further held that information is "confidential" when its disclosure would impair an agency's ability to "carry[] out [its] mandate." *9 to 5 Org. for Women Office Workers* v. *Bd. of Governors of the Fed. Reserve Sys.*, 721 F.2d 1, 10 (1st Cir. 1983); *accord Critical Mass Energy Project* v. *NRC*, 975 F.2d 871, 879 (D.C. Cir. 1992) (en banc).

The Second Circuit below did not question the Board's and the banks' "plausible" and "forceful[]" showing that disclosure of the information sought by Bloomberg "would harm the banks that borrowed" and "the banking system as a whole." *Bloomberg, L.P.* v. *Bd. of Governors of the Fed. Reserve Sys.*, 601 F.3d 143, 151 (2d Cir. 2010). Instead, the Second Circuit held—as a matter of law—that (1) the Federal Reserve Banks' ("FRB") "executive action" in approving the Discount Window loans meant that the highly confidential bank information was not "obtained from a person" outside the government, and therefore not subject to Exemption 4 protection at all, *id.* at 149; and (2) even assuming that such bank information was "obtained from a person" (the Court here was referring to the FRBs that supplied the raw lending data to the Board), Exemption 4 does not allow an agency to withhold information when doing so "'serves a valuable purpose and is useful for the effective execution of its statutory responsibilities,'" *id.* at 150.

These important rulings of law warrant this Court's review for two reasons.

First, the Second Circuit's ruling will disrupt "long-established procedures" of numerous federal agencies. *See Renegotiation Bd.* v. *Bannercraft Clothing Co.*, 415 U.S. 1, 11 (1974) (grant of

certiorari to analyze "the impact of the FOIA upon long-established procedures of the Renegotiation Board"). Many government programs, such as the Export-Import Bank's provision of loans and insurance and the National Institutes of Health's ("NIH") licensing of government inventions, depend on assuring third parties that details of their commercial transactions with federal agencies will remain confidential. In these other commercial transactions, the government typically transacts with third parties in ways that are more extensive than the loan-approval process at issue here. Nonetheless, courts have uniformly held or assumed that details of these commercial transactions are subject to Exemption 4 protection.

The Second Circuit's holding that the FRBs' "executive action" in approving Discount Window loans eliminates Exemption 4 protection for this highly confidential bank information conflicts with this line of cases and threatens to harm the government programs they protect. The harm here is magnified, because any FOIA requester that resides in the Second Circuit will be able to bind a federal agency to that Court's law. *See* 5 U.S.C. § 552(a)(4)(B) (vesting jurisdiction over FOIA actions in, among other venues, "the district court of the United States in the district in which the complainant resides, or has his principal place of business"). This is especially important in that many of the nation's leading media companies (*e.g.*, The New York Times, The Wall Street Journal, and Time magazine) are located in the Southern District of New York.

The line of cases that the Second Circuit's ruling will disrupt is consistent with the bedrock principle, codified in 5 U.S.C. § 552(b) and recognized across the Circuits, that an agency is authorized to withhold information in its entirety where the information consists of exempt data and non-exempt data that are "inextricably intertwined." *See infra* at 28-30. This rule applies fully when third parties transact with an agency: Because information concerning the completed transaction is an indivisible product of exempt data (the terms on which the third party entered into the transaction) and non-exempt data (the terms on which the government approved the transaction), the agency is authorized to withhold such information in its entirety. Certiorari is appropriate to correct the Second Circuit's error and prevent its ruling from harming numerous agency programs far beyond the lending programs at issue here.

Second, the Second Circuit's ruling "conflict[s] with the decision of another United States court of appeals on the same important matter." Sup. Ct. R. 10(a); *see also John Doe Agency* v. *John Doe Corp.*, 493 U.S. 146, 151 (1989) (grant of certiorari in FOIA Exemption 7 case because of "the importance and sensitivity of the issue [presented] and because of different interpretations of the pertinent language of [the exemption]"). Specifically, the Second Circuit's ruling—now binding the financial and media capital of the United States—split with the D.C. and First Circuits on an important question of federal law: Whether information is "confidential" within the meaning of Exemption 4 when its disclosure would impair the effectiveness of government programs.

Underlying this issue is the fundamental question whether this Court should adopt the *National Parks* two-part definition of the term "confidential," from which the "program-effectiveness" test rejected by the Second Circuit emanates. *See generally* Sup. Ct. Rule 10(c) (certiorari may be appropriate where a "United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court"); *see also Reading Co.* v. *Brown*, 391 U.S. 471, 475 (1968) (grant of certiorari to resolve question of "first impression in [the Supreme Court]" regarding bankruptcy administration); *Am. Fed'n of Musicians* v. *Wittstein*, 379 U.S. 171, 175 (1964) (grant of certiorari to resolve question of "first impression" under the Labor Management Reporting and Disclosure Act).

A. Factual Background.

1. The Discount Window and the Mechanics of Discount Window Lending.

Authorized by the Federal Reserve Act, the Discount Window "is a mechanism by which the twelve Federal Reserve Banks lend funds on a short-term basis, secured by collateral, to eligible depository institutions within their respective districts." (JA-67 ¶ 6.)[3] In performing this lending function, the Discount Window can serve "as an emergency, back-up source of liquidity for

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[3] All citations to "JA" are to the Joint Appendix submitted before the Second Circuit.

institutions that may not have access to ordinary, market sources of funding on a short term basis." (JA-74 ¶ 18.)

A bank eligible to borrow from the Discount Window requests a Discount Window loan by contacting its local FRB. When doing so, the bank supplies to the FRB, among other things, the bank's (i) "[n]ame and location"; (ii) "[t]he amount [the bank is] requesting"; and (iii) "[t]he number of days that funds will be needed."[4] After a bank initiates a Discount Window loan request, FRB staff "review the request, verify collateral and, if approved, enter the loan in the [FRB's] loan and accounting systems." (JA-70 ¶ 11.)

The FRBs, in turn, provide data concerning completed loans to the Board's Division of Monetary Affairs. (JA-38 ¶ 11.) Then, the Monetary Affairs staff use these data to generate "Remaining Term Reports"—the Reports at issue in this appeal—that reflect (i) the names of the borrowers; (ii) the amount of individual loans; and (iii) the origination and maturity dates of each loan. (*Id.*)

2. The Longstanding "Stigma" of Financial Weakness Attributed to Banks That Borrow from the Discount Window.

Because the Discount Window can serve an emergency-lending function, when a bank borrows

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[4] The Mechanics of Borrowing, http://www.frbdiscountwindow.org/mechanics/cfm?hdrID=14 (last visited on Oct. 20, 2010).

from it, market participants, customers, and counterparties may infer that the bank is experiencing "an underlying capital or liquidity problem." (JA-74 ¶ 18.) The public, in other words, may interpret a bank's Discount Window borrowing as a sign of an undisclosed financial problem and mistakenly stigmatize the bank as financially unsound. (JA-74-75 ¶¶ 17-18.) That "stigma" can "quickly place an institution in a weakened condition vis-à-vis its competitors by causing a loss of public confidence in the institution, a sudden outflow of deposits (a 'run'), a loss of confidence by market analysts, a drop in the institution's stock price, and a withdrawal of market sources of liquidity." (JA-74 ¶ 17.) "In extreme cases, such developments can lead to closure of the institution." (*Id.*)

During periods of financial distress, the stigma associated with Discount Window borrowing often intensifies, because market participants have heightened concerns that banks may be experiencing financial difficulties. (JA-75 ¶ 19.) As a result, during these periods (such as those experienced in the early and late 1990s), banks paid higher rates in the private federal funds market to avoid borrowing from the Discount Window. (*Id.*)

The effects of this stigma were further evidenced in the early 1990s, when rumors that Citibank was borrowing at the Discount Window sparked runs at some of its offices in Asia. (JA-76 ¶ 22.) Similarly, in September 2007, British bank Northern Rock experienced a bank run after the BBC reported that the Bank of England had provided emergency financial support to the bank.

See Treasury Committee, The Run on the Rock, 2007-08,-H.C. 56-1, ¶¶ 1, 147.[5]

3. The Board's Longstanding Confidentiality Policy for Discount Window Lending and the Disclosure Regime Established by the Dodd-Frank Act.

Because of the recognized stigma associated with accessing the Discount Window, banks have been reluctant to access this lending facility, even though the Board has long held "information about borrowing by individual banks in the strictest confidence." Brian F. Madigan & William R. Nelson, *Proposed Revision to the Federal Reserve's Discount Window Lending Program*, 88 Fed. Res. Bull. 313, 315 (2002). That historical reluctance stems from the fact that, notwithstanding the Board's longstanding non-disclosure policy, market participants "have at times tried to infer which banks might be borrowing [from the Discount Window] through knowledge of which banks were bidding for funds in the market late in the day and from aggregate data published by the Federal Reserve." *Id.*

The Dodd-Frank Act establishes a new disclosure regime for Discount Window loans made after the Act's enactment. The Board is now required to disclose the identities of banks that

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[5] Available at http://www.publications.parliament.uk/pa/cm200708/cmselect/cmtreasury/56/56i.pdf (last visited Oct. 20, 2010).

borrow from the Discount Window, along with other transaction-level details of their borrowing, approximately two years after such borrowing occurs. *See* Dodd-Frank Act § 1103(b) (amending Federal Reserve Act to require disclosure of post-enactment Discount Window lending—a type of "covered transaction"—"on the last day of the eighth calendar quarter following the calendar quarter in which the covered transaction was conducted").[6] In exchange, the Board is expressly authorized to withhold such information under FOIA. *See id.* (providing that enumerated Discount Window lending data "shall be confidential, including for purposes of section 552(b)(3) of title 5").

The Dodd-Frank Act, however, does not require disclosure of Discount Window lending information prior to its enactment. Specifically, section 1103(b) of the Act, which adds a new section to the Federal Reserve Act, includes a provision stating that "[n]othing in [the new section of the Federal Reserve Act] is meant to affect any pending litigation or lawsuit filed under [FOIA] on or before the date of [the Act's] enactment." This is significant, because, during the recent financial crisis, banks relied upon the Board's confidentiality policy when obtaining Discount Window loans in amounts and at intervals that would permit the

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[6] *See also* Frequently Asked Questions—Discount Window Lending Program, FAQ #11 ("[T]he Federal Reserve will publicly disclose, with approximately a two-year lag, certain information on discount window loans extended on or after July 21, 2010."), http://www.frbdiscountwindow.org/dwfaqs.cfm#ps11 (last visited Oct. 20, 2010).

public to draw inferences—whether fairly or not—about their current financial conditions.

B. Proceedings Below.

1. Bloomberg's FOIA Request and Its Adjudication in the District Court.

On May 21, 2008, Bloomberg sent a FOIA request to the Board, asking for eleven categories of documents relating to securities posted as collateral for Discount Window and other loans made between April 4, 2008 and May 20, 2008. (JA-50-51.) The Board determined that the Reports contained information responsive to the request—specifically, the names of borrowers, and the amounts and terms of individual loans—but concluded that this information was exempt from disclosure. (JA-62.)

On November 7, 2008, Bloomberg filed the instant FOIA action in the Southern District of New York. The Board and Bloomberg each moved for summary judgment, submitting supporting declarations. Specifically, the Board submitted 38 pages of declarations from a senior Board official and two officers of the Federal Reserve Bank of New York responsible for operational details for the Discount Window and the other lending facilities at issue. In those declarations, the Board provided a detailed assessment of the competitive harm likely to occur to banks through disclosure of bank-by-bank, loan-by-loan information. The Board also provided evidence demonstrating the recognized "stigma" associated with Discount Window lending.

On August 24, 2009, the District Court granted Bloomberg's cross-motion for summary judgment, dismissing the Board's evidence of competitive harm as "speculative" or "conjectural" and declining to recognize, as an additional basis for non-disclosure, the Board's interest in advancing its lending programs. *Bloomberg L.P.* v. *Bd. of Governors of the Fed. Reserve Sys.*, 649 F. Supp. 2d 262, 280 (S.D.N.Y. 2009). The District Court also held that some of the information contained in the Reports—that is, the amounts and terms of individual loans—was not "obtained from" the borrowing banks, reasoning that the FRBs' "generati[on] [of] the information contained in the [Reports] [was] sufficient to vitiate the applicability of Exemption 4 with respect to that information." *Id.* at 278. At the same time, the District Court recognized that "the borrowers' names," also contained in the Reports, were "obtained from" the borrowing banks. *Id.*

After this ruling, The Clearing House moved to intervene for purposes of appeal, arguing, among other things, that the Board may not adequately protect its interests because the Board had not yet received Solicitor General authorization to pursue an appeal. The District Court granted The Clearing House's intervention motion, and The Clearing House participated as a party in the appeal to the Second Circuit.[7]

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[7] The Clearing House, like other associations of its type, had standing to participate as a party in the appeal and has standing to seek certiorari, because "(a) its members would otherwise have standing to sue in their own right; (b) the

(footnote continued)

2. Fox News's FOIA Request and Its Adjudication in the District Court.

Bloomberg was not alone in its request for Discount Window lending information. On November 10, 2008, Fox News filed a FOIA request (which it subsequently clarified and then supplemented with another) essentially seeking "the names of institutions receiving Federal Reserve lending" from eleven named programs and "any other Federal Reserve lending facility," as well as "an accounting of the collateral provided by these institutions in exchange for the lending" from August 8, 2007 through November 17, 2008. (*Fox* JA-169-71.)[8] In response, the Board identified, among other responsive documents, two types of reports, called "Origination Reports" and "Remaining Term Reports." These reports contained the identities of banks that borrowed from the Discount Window, along with the amounts and durations of the loans they obtained. (*Fox* JA-29-31.) The Origination

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(footnote continued)
interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt* v. *Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977); *see also, e.g.*, *Cuomo* v. *The Clearing House Ass'n, LLC*, 129 S. Ct. 2710, 2714 (2009) (reviewing challenge by The Clearing House to New York Attorney General's investigation of lending practices of certain of its members and other national banks).

[8] All references to "*Fox* JA __" are to the joint appendix filed in the Second Circuit in *Fox News Network, LLC*, v. *Board of Governors of the Federal Reserve System*, No. 09-3795-cv.

Reports contained information for the business days of August 20, 2007 to November 14, 2008; the Remaining Term Reports covered an overlapping period of business days from February 11, 2008 to November 14, 2008. (*Id.*) The Board withheld these reports on the ground that they were exempt under Exemptions 4 and 5 and contained no reasonably segregable non-exempt information. (*Id.*)

Fox News, like Bloomberg, filed an action in the Southern District of New York challenging the Board's decision to withhold these reports. But unlike in *Bloomberg*, on July 30, 2009, the District Court ruled against Fox News, holding, first, that the information in the reports at issue reflected "information that originated with the borrower" and therefore "'obtained from' the borrower." *Fox News Network, LLC* v. *Bd. of Governors of the Fed. Reserve Sys.*, 639 F. Supp. 2d 384, 399 (S.D.N.Y. 2009). The Court also ruled that this information was "confidential" because (1) the Board had sustained its burden of showing "specific and substantial harms to borrowers if the information about Discount Window loans were disclosed"; and (2) disclosure of the reports "would compromise the Board's effective execution of its statutory responsibilities." *Id.* at 400-02.

The Court subsequently amended and filed its final judgment on September 2, 2009. (*Fox* JA-6.) Fox News appealed from this judgment on September 9, 2009. (*Id.*)

3. Proceedings Before the Second Circuit.

The *Bloomberg* and *Fox* appeals were heard in tandem, by the same panel and on the same day. Both appeals concerned the same core issues: (1) whether the identity of a borrowing bank and transaction-level details of its borrowing was information "obtained from a person"; and (2) whether this information was "confidential" within the meaning of Exemption 4.

The Ruling in Bloomberg. The *Bloomberg* and *Fox News* appeals were also decided on the same day, by two separate opinions. In the *Bloomberg* opinion—the one at issue in this petition—the Second Circuit accepted the Board's and The Clearing House's "plausible" and "forceful[]" arguments that disclosure of the Reports would "harm the banks that borrowed" and "the banking system as a whole." *Bloomberg*, 601 F.3d at 150. The Second Circuit nonetheless held that the highly confidential bank information in the Reports was not "obtained from" the borrowing banks—and thus not within the class of information protected by Exemption 4—because the loans at issue "did not come into existence until the Federal Reserve Bank took executive action by granting the loan." *Id.* at 149. In other words, the Court reasoned that the FRBs' "executive action" in "grant[ing]" the loans—even if such approval were "automatic[]"—eliminated any Exemption 4 protection irrespective of the information's commercial sensitivity. *Id.* at 150.

The Second Circuit further held that, even assuming the information in the Reports was

obtained by the Board "from a person" (the panel was referring here to the FRBs that supplied the raw lending data to the Board),[9] Exemption 4 did not authorize a federal agency to withhold information where doing so "'serves a valuable purpose and is useful for the effective execution of its statutory responsibilities.'" *Id.* at 150. The Court reasoned that such an interpretation of the term "confidential" (1) finds "no basis" in the statute; and (2) would "give impermissible deference to the agency," thereby making it the "functional equivalent" of the "'public interest'" standard rejected by this Court, for purposes of Exemption 5, in *FOMC* v. *Merrill*, 443 U.S. 340 (1979). *Bloomberg*, 601 F.3d at 150-51.

The Ruling in Fox. The Court in *Fox* applied the holding in *Bloomberg* to rule that "the information unambiguously at issue in the Fox News requests—the identity of the borrowing bank, the dollar amount of the loans, the collateral securing the loans, and the loan origination and maturity dates—is not protected from disclosure by Exemption 4." *Fox News Network, LLC* v. *Bd. of Governors of the Fed. Reserve Sys.*, 601 F.3d 158, 160 (2d Cir. 2010). It then proceeded to discuss, in an issue not relevant to this petition, whether the Board had adequately searched for additional agency records held at the Federal Reserve Banks. *See id.* at 160-63.

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[9] The Second Circuit nowhere explained how the FRBs could (1) be considered "agencies" when they approved Discount Window loans and yet (2) be considered "persons" when they supplied the raw lending data concerning these loans to the Board.

Post-Judgment Developments. On May 3, 2010, the Board and The Clearing House filed timely petitions for panel and *en banc* rehearing of the decision in *Bloomberg*. The Board also filed a similar petition for rehearing in *Fox*. While those petitions were pending, the Board submitted a letter in both appeals, pursuant to Federal Rule of Appellate Procedure 28(j), explaining that passage of the Dodd-Frank Act did not moot the appeals.

On August 20, 2010, the Second Circuit denied the rehearing petitions in both *Bloomberg* and *Fox*. Both the Board and The Clearing House subsequently moved to stay the Second Circuit's mandate in *Bloomberg*, arguing that there was "good cause" to do so and that a certiorari petition would present a "substantial question" warranting this Court's review—in other words, that there was a reasonable probability of obtaining this Court's review and a fair prospect of achieving reversal. The Board filed a similar motion in *Fox*. By orders dated August 27, 2010, the Second Circuit stayed its mandates for 60 days in both *Bloomberg* and *Fox* to enable the Board to obtain authorization from the Solicitor General to file a certiorari petition and to enable The Clearing House to file such a petition.

Notwithstanding the Board's receipt of Solicitor General approval to file a request for *en banc* rehearing, and notwithstanding the Board's consistent position that the *Bloomberg* decision will have negative and far-reaching ramifications for banking and other agencies (as detailed in the Board's rehearing petitions), on October 22, 2010, counsel for the Board informed The Clearing House that the Solicitor General denied the Board's request

to file a certiorari petition. This petition, which names the Board as a respondent, followed.[10]

REASONS FOR GRANTING THE PETITION

This Court should grant this petition for two reasons.

First, if left undisturbed, the Second Circuit's ruling will undo a long line of cases authorizing agencies to withhold sensitive details concerning a third party's commercial transactions with the government. This line of cases is critical to protect numerous government functions—such as the ability of the Export-Import Bank to extend loans and insurance, and that of the NIH to license government inventions—that depend on assuring third parties that details of these commercial transactions will not be disclosed. These cases are consistent with the principle, codified in 5 U.S.C. § 552(b) but ignored in the decision below, that an agency is authorized to withhold information where it consists of exempt and non-exempt data that are inextricably intertwined.

Second, this case presents a question of first impression in this Court of undeniable importance to FOIA law, and one over which the Circuits are now split: What is the governing test to determine whether information is "confidential" within the meaning of Exemption 4, and whether this test authorizes an agency to withhold information whose

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[10] The Clearing House also intends to move to intervene in the *Fox* appeal in order to stay that Court's mandate pending the disposition of this certiorari petition.

disclosure would impair a government program. The Second Circuit, which has previously adopted *National Parks*' two-part definition of the term "confidential," improperly rejected the D.C. and First Circuits' extension of *National Parks* to protect an agency's ability to effectuate the purposes of its programs. In doing so, the Second Circuit adopted an overly restrictive textual interpretation of the statute that fails to properly give effect to the purpose behind the exemption.

I. THE SECOND CIRCUIT'S ERRONEOUS "OBTAINED FROM A PERSON" RULING THREATENS NUMEROUS AGENCY PROGRAMS THAT DEPEND ON MAINTAINING THE CONFIDENTIALITY OF COMMERCIAL TRANSACTIONS WITH SUCH AGENCIES.

A. Courts Have Long Held That Exemption 4 Protects Commercially Sensitive Details of Third Parties' Commercial Transactions with Federal Agencies.

The Second Circuit held that the highly confidential bank information in the Reports was not "obtained from" the borrowing banks because the loans did not exist but for the FRBs' "executive action" in "grantin[g]" Discount Window loans, even if such approval was "automatic[]." *Bloomberg*, 601 F.3d at 149.

This holding necessarily threatens to undo Exemption 4 protection in numerous situations where third parties transact with a federal agency.

That is because *every* commercial transaction by a third party with the government reflects both third-party and government action; the transaction voluntarily entered into by the third party would not exist but for government approval and involvement.

Indeed, one lower court has already applied *Bloomberg* to require the Treasury Department to disclose "the name of a commercial bank" that applied for but subsequently withdrew its request for funding through a Treasury lending program, reasoning that the bank's name was not "obtained from a person" because it was "'generated within [Treasury] upon its decision to grant a loan.'" *Fox News Network, LLC* v. *U.S. Dep't of the Treasury*, --- F. Supp. 2d ---, 2010 WL 3705283, at *36-37 (S.D.N.Y. Sept. 3, 2010) (quoting *Bloomberg*, 601 F.3d at 148) (alteration in original).

This ruling is a harbinger of many others. That is because federal agencies frequently interact with third parties in ways far more extensive than the straightforward loan-approval process at issue here. Nonetheless, in these other situations, numerous courts have held or assumed that a third party's commercial dealings with the government consist of information "obtained from a person," and are therefore subject to Exemption 4 protection—

Loans and Insurance Extended by the Export-Import Bank. The Export-Import Bank is a federal agency that "aid[s] in financing and facilitating exports and the exchange of goods and services between the United States and foreign countries." *Judicial Watch, Inc.* v. *Export-Import Bank*, 108 F. Supp. 2d 19, 24 (D.D.C. 2000). To achieve that goal, the Bank "provide[s] guarantees,

insurances, and extensions of credit on competitive terms to United States businesses that seek to export goods and services to other countries." *Id.* These guarantees, insurances, and extensions do not exist but for the Bank's approval, and are subject to negotiation between the Bank, exporters, and other third parties. Parties insured by the Bank, for instance, "often agree to additions to or deletions from the Bank's standard export insurance policy" that may reflect "when the insured has made a concession to the Bank." *Id.* at 29. The Bank also "participat[es] in the negotiation process" with respect to loan agreements that it finances. *Comstock Int'l (U.S.A.), Inc.* v. *Export-Import Bank of the U.S.*, 464 F. Supp. 804, 807 (D.D.C. 1979).

In *Judicial Watch*, 108 F. Supp. 2d 19, the District Court for the District of Columbia held that the Export-Import Bank properly withheld, *inter alia*, "'the amount of the insurance premium'" being paid by the exporter to the Bank, since "a competitor who is familiar with the way the Bank determines its premium rates . . . could deduce the shipment amount from the premium amount." *Id.* at 31. Before reaching that conclusion, the court emphasized that the information sought by the FOIA requester was obtained by the Export-Import Bank "from the insurance applicants themselves, commercial lenders of the applicant, or a purchaser of the goods at issue." *Id.* at 28.

In *Comstock International*, 464 F. Supp. 804, the District Court for the District of Columbia protected from disclosure a loan agreement to which the Export-Import Bank was a party. The agreement detailed, among other things, "the terms

and conditions under which [the Export-Import Bank] and [a private bank]" extended credit. *Id.* at 806. Those details were protected from disclosure even though "the information contained in the loan agreement [was] not submitted to the government but rather generated by it through Eximbank's participation in the negotiation process." *Id.* at 807.

Royalty Rates Paid by Government Licensees. The NIH develops inventions that the government subsequently licenses to third parties. During the licensing process, the government "negotiates" a final royalty rate with licensees. *See Pub. Citizen Health Research Group* v. *NIH*, 209 F. Supp. 2d 37, 44 (D.D.C. 2002). Neither the licenses nor the rates set therein would exist but for government approval.

In *Public Citizen*, 209 F. Supp. 2d 37, the District Court for the District of Columbia held that the negotiated final royalty rate is "obtained from a person" and, therefore, subject to Exemption 4 protection. *See id.* at 44 ("Even though the final royalty rate is arrived at through negotiation, this does not alter the fact that the licensee is the ultimate source of this information."). The court then refused to order disclosure of the negotiated royalty rates, because competitors could use those rates, to the licensee's competitive disadvantage, to "make a rough calculation of [the licensee's] profit margin on a particular drug." *Id.* at 47.

Treasury Bond Issuances. The Treasury Department issues bonds to private entities in order to finance the public debt.

In *Clarke* v. *U.S. Dep't of Treasury*, No. 84-1873, 1986 WL 1234 (E.D. Pa. Jan. 28, 1986), the District Court for the Eastern District of Pennsylvania held that "the names and addresses" of a certain type of Treasury bond, along with details concerning "the [bonds'] dollar amount, coupon and maturity date[s]," were "[u]nquestionably . . . obtained from persons outside the government." *Id.* at *2. That ruling enabled the Treasury Department to maintain its "'long tradition of confidentiality of the ownership of United States Treasury securities,'" breach of which would have enabled market participants to gain a "'significant competitive advantage'" by learning the positions of other bondholders. *Id.* at *3.

Line-Item Pricing in Government Contracts. Agencies, such as NASA and the Department of the Air Force, contract with private parties for the provision of goods or services. In doing so, those agencies may request "the submission of proposed prices for certain contract line items." *McDonnell Douglas Corp.* v. *NASA*, 180 F.3d 303, 304 (D.C. Cir. 1999). The government contract is then subject to "further negotiations on prices and terms." *Id.* Neither the contract nor its specific terms would exist but for government approval.

In *McDonnell Douglas*, the D.C. Circuit concluded that "pricing information contained in a contract" between McDonnell Douglas and NASA was protected by Exemption 4. *Id.* In *Canadian Commercial Corp.* v. *Dep't of the Air Force*, 514 F.3d 37 (D.C. Cir. 2008), the D.C. Circuit likewise observed that negotiated line-item prices between McDonnell Douglas and the Air Force "f[ell] within

Exemption 4 of the FOIA if [their] disclosure would 'impair the government's ability to obtain necessary information in the future' or 'cause substantial harm to the competitive position of the person from whom the information was obtained.'" *Id.* at 40.[11]

* * *

The Second Circuit's ruling cannot be reconciled with this line of cases. If the FRBs' "executive action" here—which consisted only of approving Discount Window loans—were enough to eliminate Exemption 4 protection, Exemption 4 protection would be unavailable in these other commercial settings, where the government is typically *more* involved in setting the final terms of the transaction.

Thus, if left to stand, the Second Circuit's ruling would impair numerous agency programs that depend on assuring third parties that details of their commercial transactions with the government will

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[11] The D.C. Circuit noted, but did not consider, the Government's unpreserved argument that "pricing information is not 'obtained from' a contractor but rather emerges from contract negotiations between the parties." *Id.* at 41 n.*.

Subsequently, in a similar case involving unit-pricing information, the District Court for the District of Columbia stated that "the parties agree that the information is 'commercial or financial information obtained from a person.'" *Gen. Elec. Co.* v. *Dep't of Air Force*, 648 F. Supp. 2d 95, 101 (D.D.C. 2009). In doing so, the court noted that, in light of the D.C. Circuit's ruling in *Canadian Commercial*, the Air Force no longer disputed whether "unit pricing information could come within the scope of Exemption 4 at all, regardless of whether [such information] could be shown to be confidential." *Id.* at 101 n.5.

remain confidential. If federal agencies cannot provide these assurances, third parties will turn away from these programs, impairing the programs' effectiveness and the national interests they serve.[12]

B. The Second Circuit's Ruling Contravenes the Established Principle That an Agency May Withhold "Inextricably Intertwined" Exempt and Non-Exempt Data.

The Second Circuit's ruling, if left to stand, will impair numerous government programs. *See supra* at 22-26. It will also wreak havoc in FOIA law by undermining the settled principle, codified in 5 U.S.C. § 552(b) and recognized across the Circuits, that permits an agency to withhold information where it consists of exempt and non-exempt data that are "inextricably intertwined." *See* 5 U.S.C. § 552(b) (requiring agencies to disclose non-exempt information only to the extent that such information

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[12] *See Pub. Citizen*, 209 F. Supp. at 53 (crediting affidavit stating that "'licensees will not negotiate with NIH without an expectation that the financial terms of the licenses will remain confidential'"); *Judicial Watch*, 108 F. Supp. 2d at 30 ("[F]oreign purchasers may seek financing outside of the United States . . . if subjected to the risk of disclosure of their confidential commercial or financial information."); *Clarke*, 1986 WL 1234, at *2-3 ("releasing the requested information would harm the national interest because investors would be less likely to purchase government bonds in the future"); *Comstock Int'l*, 464 F. Supp. at 808 (crediting "'specific, factual or evidentiary material'" demonstrating, *inter alia*, that disclosure would make loan applicants "unwilling[] to subject themselves to the possible risk of disclosure").

can be "reasonably segrega[ted]" from that which is exempt).[13]

This rule applies fully here. By any measure, the terms on which banks applied for Discount Window loans existed prior to—and independent of—the loans' approval. In other words, the Reports summarize *both* the information "obtained from" banks, most notably their identities, as even Bloomberg did not dispute below, and the FRB's decision to make loans on those terms. Similarly, the Reports inextricably reflect the terms on which banks accepted Discount Window loans.

Because disclosing the terms on which FRBs approved Discount Window loans necessarily reveals (i) the terms on which each bank *applied* for these loans, and (ii) the terms on which each bank *accepted* these loans, the Reports reflect information "obtained from" the banks that is inextricably

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[13] *See also Mead Data Cent., Inc.* v. *U.S. Dep't of the Air Force*, 566 F.2d 242, 260 (D.C. Cir. 1977) (agency may withhold non-exempt information if "inextricably intertwined" with exempt information); *Rein* v. *Patent & Trademark Office*, 553 F.3d 353, 374 (4th Cir. 2009) (same); *Missouri Coalition for Envt'l Found.* v. *Army Corps of Eng'rs*, 542 F.3d 1204, 1212 (8th Cir. 2008) (same); *Miccosukee Tribe of Indians of Fla.* v. *U.S.*, 516 F.3d 1235, 1257 n.22 (11th Cir. 2008) (same); *Inner City Press/Community on the Move* v. *Bd. of Governors of the Fed. Reserve Sys.*, 463 F.3d 239, 249 n.10 (2d Cir. 2006) (same); *Flightsafety Servs. Corp.* v. *Dep't of Labor*, 326 F.3d 607, 613 (5th Cir. 2003) (same); *Patterson* v. *IRS*, 56 F.3d 832, 840 (7th Cir. 1995) (same); *Church of Scientology Int'l* v. *U.S. Dep't of Justice*, 30 F.3d 224, 228 (1st Cir. 1994) (same); *Andrews* v. *Veterans Admin.*, 838 F.2d 418, 422 (10th Cir. 1988) (same); *Willamette Indus., Inc.* v. *U.S.*, 689 F.2d 865, 867 (9th Cir. 1982) (same).

intertwined with the information "generated" by the FRBs. Thus, the Reports "contained no reasonably segregable non-exempt information," as the Board explained when detailing its reasons for denying Bloomberg's FOIA request. (JA-57.)

The Second Circuit's legal conclusion that the information in the Reports was not "obtained from" borrowing banks is thus untenable. It also leads to a result at odds with the statute: Under the Second Circuit's reasoning, Exemption 4 would not apply *even if* disclosure of the Reports would harm the very third parties (here, banks) that Exemption 4 was designed to protect. *See Bloomberg*, 601 F.3d at 150 (acknowledging the "plausible" and "forcefully made" arguments that disclosure of the information sought by Bloomberg would "harm the banks that borrowed"). This conclusion can only be the result of a "nonfunctional" interpretation of the FOIA that fails to give effect to the "reasons for [the] exemption." *John Doe Agency*, 493 U.S. at 157.

II. THE SECOND CIRCUIT OPENLY SPLIT WITH THE D.C. AND FIRST CIRCUITS IN HOLDING THAT EXEMPTION 4 DOES NOT PROTECT "CONFIDENTIAL" INFORMATION WHOSE DISCLOSURE WOULD IMPAIR THE EFFECTIVENESS OF FEDERAL PROGRAMS.

The Second Circuit, creating a conflict with the D.C. and First Circuits, refused to interpret the term "confidential" to include information whose disclosure would impair government programs. The Second Circuit did so on the basis that such an interpretation (1) finds "no basis" in the statute and

(2) would represent an unbounded expansion of Exemption 4. *See Bloomberg*, 601 F.3d at 150-51.

This split is on an undeniably important question of FOIA law: What is the governing test to determine whether information is "confidential" within the meaning of Exemption 4, and whether this test allows an agency to withhold information when its disclosure would harm agency programs.

The *National Parks* definition of the term "confidential" is well established and should be endorsed by this Court. *See Contract Freighters, Inc.* v. *Sec'y of U.S. Dep't of Transp.*, 260 F.3d 858, 861 (8th Cir. 2001) (observing that "the *National Parks* test" has been "widely recognized and applied by the circuit courts when construing Exemption 4." (collecting authority)). Recognizing that FOIA "contains no definition of the word 'confidential,'" the *National Parks* court looked—properly—to the "legislative purpose" underlying the exemption in order to interpret it meaningfully. 498 F.2d at 767. This approach is fully consistent with this Court's instruction to interpret FOIA exemptions practically, by "looking to the reasons for [the] exemption" and "apply[ing] a workable balance between the interests of the public in greater access to information and the needs of the Government to protect certain kinds of information from disclosure." *John Doe Agency*, 493 U.S. at 157.

The Second Circuit erred when, though it has long endorsed the *National Parks* interpretation of Exemption 4, *see Cont'l Stock Transfer & Trust Co.* v. *SEC*, 566 F.2d 373, 375 (2d Cir. 1977), it nonetheless refused to read *National Parks* to protect an agency's interest in advancing its programs. The First Circuit

rejected just such an "unduly restrictive" interpretation of *National Parks*, recognizing that *National Parks* "identified the two interests which are *most frequently* threatened by the disclosure of commercial or financial information," but did not impose a rigid limitation "on the number of legitimate interests" which the exemption protects. *9 to 5*, 721 F.2d at 1, 9 (emphasis added). Instead, the *National Parks* test was designed to protect from disclosure information whose release would harm "an identifiable private or governmental interest which the Congress sought to protect by enacting exemption 4." *Id.* at 10. One of these interests is that of the government in withholding information "which would be particularly helpful to agency officials in carrying out their mandate." *Id.* This interest stems directly from Exemption 4's legislative history, in which "the problems of compliance and program effectiveness are mentioned as governmental interests possibly served by this exemption." *National Parks*, 498 F.2d at 770 n.17.

The Second Circuit further erred when it reasoned that the program-effectiveness test recognized by the D.C. and First Circuits would "give impermissible deference to the agency." *Bloomberg*, 601 F.3d at 150. This test is nothing like the "vague 'public interest'" standard rejected by this Court, for purposes of Exemption 5, in *Merrill*, 443 U.S. at 354. Unlike Exemption 5, Exemption 4 requires the government to prove that the information sought to be protected, in addition to being "privileged or confidential," is obtained from a third party and is a "trade secret[]" or "commercial or financial" in nature. 5 U.S.C. § 552(b)(4). Those requirements ensure that the test can be invoked only in a

commercial setting when the government interacts with third parties that supply presumptively sensitive business information in such transactions.

Even in this limited setting, the program-effectiveness test is not toothless. To satisfy this test, the government must still "identify the particular interest [protected by the exemption], and . . . demonstrate how that interest will be harmed by public disclosure of the specific information which has been requested." *9 to 5*, 721 F.2d at 10; *accord Critical Mass*, 830 F.2d at 286. In practice, the government must submit evidence, as the Board did here, showing how disclosure will harm participants in the identified government program—and therefore discourage them from participating in the future—if the requested information is released.[14]

This evidence, moreover, is not something generated *ex post* and subject to agency abuse; it serves as the cornerstone for a confidentiality policy that, as with the Discount Window, is typically in longstanding use.[15]

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[14] *See, e.g., Clarke*, 1986 WL 1234, at *2-3 (crediting government affidavit demonstrating that market participants "'with access to [bondholder] data concerning the positions of other participants would have a significant competitive advantage'"); *Pub. Citizen*, 209 F. Supp. 2d at 53 (concluding that disclosure of the requested information "would seriously impair [the government's ability] in carrying out its public health responsibilities" (internal quotation marks omitted)).

[15] *See, e.g., Clarke*, 1986 WL 1234, at *3 (crediting government affidavit discussing "'the long tradition of confidentiality of the ownership of United States Treasury securities'"); *Pub. Citizen*, 209 F. Supp. 2d at 53 n.9 (noting that the NIH "takes

(footnote continued)

In all, the program-effectiveness is consistent with *National Parks*' approach to interpreting Exemption 4; fits within the exemption's legislative design; and appropriately balances the public's interest in disclosure against "the needs of the Government to protect certain kinds of information." *John Doe Agency*, 493 U.S. at 157. This Court should therefore grant this petition in order to provide a definitive interpretation of the term "confidential"—the centerpiece of Exemption 4—that will resolve the existing split in the circuits.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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(footnote continued)
confidentiality [of royalty information] very seriously because every licensing agreement contains a confidentiality clause").

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket Nos. 09-4083-cv; 09-4097-cv

Argued: January 11, 2010
Decided: March 19, 2010

BLOOMBERG, L.P.,

Plaintiff-Appellee,

—v.—

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM,

Defendant-Appellant,

—and—

THE CLEARING HOUSE ASSOCIATION L.L.C.,

Appellant.

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CORY L. ANDREWS, Daniel J. Popeo, Washington Legal Foundation, Washington, D.C., for Amici Curiae Washington Legal Foundation and Allied Educational Foundation *in support of Plaintiff-Appellee.*

C. DAWN CAUSEY, GREGORY TAYLOR, American Bankers Association, Washington, D.C., for Amicus Curie American Bankers Association *in support of Defendant-Appellant and Intervenor-Appellant.*

Before JACOBS, *Chief Judge,* LEVAL and HALL, *Circuit Judges.*

DENNIS JACOBS, *Chief Judge*:

The Federal Reserve System—the central bank of the United States—is composed of twelve regional Federal Reserve Banks and the defendant-appellant Board of Governors of the Federal Reserve System ("Board"), in Washington, D.C. The Board is a federal agency that (among other things) supervises the operations of the twelve Federal Reserve Banks.

Plaintiff Bloomberg, L.P., a news organization, submitted Freedom of Information Act ("FOIA") requests to the Board in April and May 2008. The requests sought (in relevant part) detail about loans that the twelve Federal Reserve Banks made to private banks in April and May 2008 at the Discount Window and pursuant to *ad hoc* emergency lending programs (described in the margin[1]). Bloomberg asked, loan by loan, for the

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[1] Bloomberg sought information about loans conducted at the Discount Window, the Primary Dealer Credit Facility ("PDCF"), the Term Securities Lending Facility ("TSLF"),

name of the borrowing bank, the amount of the loan, the origination and maturity dates, and the collateral given.

The Board denied these requests (in relevant part) in December 2008. The Board conceded possession of records showing the loan information Bloomberg sought, with the exception of the collateral; collateral information is held by the lending Federal Reserve Banks. But the Board advised that the responsive information in its possession —contained in "Remaining Term Reports"—was exempt from disclosure under FOIA Exemptions 4 and 5. The Board did not search the lending records of the twelve Federal Reserve Banks, explaining that a request to the Board does not constitute a request for information held by those institutions.

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and the Term Auction Facility ("TAF"). The Discount Window is the long-standing program through which the twelve Federal Reserve Banks make short-term loans (often overnight) to depository institutions, and it can serve as "an emergency, back-up source of liquidity" for borrowing depository institutions that lack other options. Decl. of Brian F. Madigan ¶ 18. In the financial crisis of 2007, the Board authorized the Federal Reserve Banks to implement the TAF, a form of Discount Window lending that provides longer-term loans to depository institutions in amounts and at rates set by auction. In response to the continuing financial crisis, in 2008 the Board authorized the Federal Reserve Bank of New York to lend to primary dealers (certain banks and broker dealers) through the PDCF and TSLF. The PDCF expands Discount Window-style lending to primary dealers. The TSLF permits primary dealers to obtain Treasury Securities in exchange for a pledge of other types of securities; this is implemented through an auction administered by the Federal Reserve Bank of New York.

Bloomberg brought this action in November 2008 (before receiving the formal denial of both its requests) in the United States District Court for the Southern District of New York (Preska, *Ch.J.*) to compel disclosure of the responsive documents and to compel the Board to conduct a search of the records held at the Federal Reserve Bank of New York (which had granted many of the largest loans in the relevant period). Following cross-motions for summary judgment, the district court ruled that the Remaining Term Reports were not exempt from FOIA disclosure under FOIA Exemption 4 or 5, and that certain Federal Reserve Bank records must be searched to respond adequately to the FOIA request. *See Bloomberg L.P. v. Bd. of Governors of the Fed. Reserve Sys.*, 649 F.Supp.2d 262 (S.D.N.Y.2009). After judgment was entered, the Clearing House Association (a group of banks) was granted leave to intervene as a defendant. The judgment was stayed pending this appeal. As the records of the Federal Reserve Bank of New York had not been searched, we need not decide here whether what may be found must be produced.

The Board and the Clearing House appeal only on the ground that a proper interpretation of FOIA Exemption 4 covers the requested material. No contest is made as to Exemption 5, or as to the scope of the Board's (disputed) obligation to conduct a search of records at the Federal Reserve Bank of New York. Any argument that the Board had as to Exemption 5, or either side had as to the scope of the ordered search at the Federal Reserve Bank of New York is therefore deemed waived. *Norton v. Sam's Club*, 145 F.3d 114, 117 (2d

Cir.1998). Whether certain records of the twelve Federal Reserve Banks are records of the Board is an issue that is decided in an opinion—filed simultaneously with this opinion—in the appeal (heard in tandem with this appeal) from the Southern District's decision in *Fox News Network, LLC v. Board of Governors of the Fed. Reserve Sys.*, 639 F.Supp.2d 384 (S.D.N.Y.2009). *See Fox News Network, LLC v. Bd. of Governors of the Fed. Reserve Sys*, 601 F.3d 158, 2010 WL 986665 (2d Cir.2010).

The only question decided in this opinion is whether the Board may withhold the responsive Remaining Term Reports under Exemption 4, which allows a federal agency (in this case, the Board) to refuse disclosure of "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4). "Exemption Four applies if a tripartite test is satisfied: (1) The information for which exemption is sought must be a trade secret or commercial or financial in character; (2) it must be *obtained from a person;* and (3) it must be privileged or confidential." *Nadler v. FDIC*, 92 F.3d 93, 95 (2d Cir.1996) (emphasis added) (internal citations, alterations, and quotation marks omitted). Bloomberg concedes that the information is financial in character: That is why it wants it. The parties dispute whether the second and third parts are satisfied.

We hold that the information at issue—the identity of the borrowing bank, the dollar amount of the loans, the loan origination and maturity dates, and the collateral securing the loan—was not "obtained from" the borrowing banks within the meaning of FOIA Exemption 4. We therefore do

not reach the question whether such information is "privileged or confidential" as to the borrowing banks.

The Board's alternative argument is that the Board obtained information from the Federal Reserve Banks, and that the Federal Reserve Banks are "persons." Putting aside a fair question as to whether the Federal Reserve Banks are "persons" or agencies, we conclude that disclosure of the contested records would not cause the Federal Reserve Banks to suffer the kind of harm contemplated by the "privileged or confidential" requirement of Exemption 4.

I

The "basic purpose [of FOIA] reflected a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language." *Dep't of the Air Force v. Rose*, 425 U.S. 352, 360-361, 96 S.Ct. 1592, 48 L.Ed.2d 11 (1976) (internal quotation marks omitted).

To implement this presumption for disclosure, FOIA exemptions "have been consistently given a narrow compass." *U.S. Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 151, 109 S.Ct. 2841, 106 L.Ed.2d 112 (1989); *see also Inner City Press/Cmty. on the Move v. Bd. of Governors of the Fed. Reserve Sys.*, 463 F.3d 239, 244 (2d Cir.2006). "[A]ll doubts [are] resolved in favor of disclosure." *Local 3, Int'l Bhd. of Elec. Workers v. NLRB*, 845 F.2d 1177, 1180 (2d Cir.1988). And "the burden [is] on the agency to justify the withholding of any requested documents." *U.S. Dep't of State v. Ray*, 502 U.S. 164, 173, 112 S.Ct. 541, 116 L.Ed.2d 526

(1991). The agency's decision that the information is exempt from disclosure receives no deference; accordingly, the district court decides *de novo* whether the agency has sustained its burden. 5 U.S.C. § 552(a)(4)(B); *U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 755, 109 S.Ct. 1468, 103 L.Ed.2d 774 (1989). Appellate review is likewise *de novo*. *Halpern v. FBI*, 181 F.3d 279, 288 (2d Cir.1999).

The Board advances two distinct arguments to support the proposition that the disputed information was "obtained from a person" under Exemption 4: (1) the loan information contained in the Remaining Term Reports was "obtained" from the borrowing banks because the amount, terms, and conditions of each loan to each borrower was in effect determined by the loan request itself; and (2) the Federal Reserve Banks that made the loans and passed the information on to the Board are "person[s]" from which the Board "obtained" the information.

II

Was the information in the Remaining Term Reports "obtained from a person?" FOIA defines a "person" as including "an individual, partnership, corporation, association, or public or private organization other than an agency." 5 U.S.C. § 551(2). It is uncontested that the borrowing banks are persons under this definition.

A completed loan application will ordinarily contain considerable information, and when it is submitted to a lender, the lender has "obtained" that information from the applicant. But Bloomberg's

FOIA request does not seek loan applications; it seeks documents that show what loans the Federal Reserve Banks actually made. True, disclosure of loan terms allows one to back into information about the borrower; inferences may be drawn that the bank that got the loan asked for it, that it got no more than it requested, and that the other terms were acceptable to the borrower. But the fact of the loan (and its terms) cannot be said to be "obtained from" the borrower, however confident, creditworthy, and presumptuous the borrower may be. The fact that information *about* an individual can sometimes be inferred from information *generated within an agency* does not mean that such information was *obtained from* that person within the meaning of FOIA. *Cf. Rose*, 425 U.S. at 360-61, 96 S.Ct. 1592 (FOIA exemptions are to be "narrowly construed").

The information requested by Bloomberg was generated within a Federal Reserve Bank upon its decision to grant a loan. Like the loan itself, it did not come into existence until a Federal Reserve Bank made the decision to approve the loan request. "[Courts] have read the requirement that information be 'obtained from a person' to restrict the exemption's application to data which have not been generated within the Government." *Board of Trade v. Commodity Futures Trading Comm'n*, 627 F.2d 392, 403-04 (D.C.Cir.1980); *see also Judicial Watch, Inc. v. FDA*, 449 F.3d 141, 148 (D.C.Cir.2006) ("Unlike many other types of information subject to an agency's control, materials implicating Exemption 4 are generally not developed within the agency."). In an analogous case in this Circuit, involving a FOIA request to

the Small Business Administration, Judge Curtin concluded that the agency's loan information was "generated by the [Small Business Administration] in the course of its involvement with its borrowers." *Buffalo Evening News, Inc. v. Small Business Admin.*, 666 F.Supp. 467, 469 (W.D.N.Y. 1987).

Some courts have extended the protection of Exemption 4 to information beyond the raw data gathered from persons by the government. *See, e.g., OSHA Data/CIH, Inc. v. U.S. Dep't of Labor*, 220 F.3d 153, 162 n. 23 (3d Cir.2000) (holding that disclosure of a ratio derived by an agency from the numbers supplied by a person would disclose commercial information obtained from a person and would thus come within Exemption 4 if the information was confidential); *Gulf & W. Indus., Inc. v. United States*, 615 F.2d 527, 530 (D.C.Cir.1979) (holding that disclosure of a government report containing figures from which information obtained from a company could be extrapolated would disclose information obtained from a person and came within Exemption 4). But these cases do not bear upon the present case, where what is requested is not merely the information collected and slightly reprocessed by the government, but disclosure of the agency's own executive actions. We conclude that they do not provide a reason to extend Exemption 4 to cover the information requested in this case.

The Board's chief argument is that, with respect to the Discount Window and the other programs at issue, the Federal Reserve Banks have no discretion in choosing whether to grant the requested loans— so that in effect, it is the borrowing bank

that supplies to the Federal Reserve Bank the particulars of the loan that the Federal Reserve Bank will make as a matter of course. According to the Board, the Federal Reserve Banks did nothing but translate the loan requests (information "obtained from" the borrowing banks) into loan approvals for payout by compliant tellers. In other words, it argues, the information was "generated" by the borrowers, not the Federal Reserve Banks.

The Board's argument relies on the requested loans being granted automatically; only in that way would the information Bloomberg seeks be the same as the information supplied by the borrowing banks and arguably not "generated" or "developed" by the Federal Reserve Banks. This premise (even if it were decisive) is not supported by the record. According to Dr. Brian Madigan, a Board economist who submitted a declaration in this matter: Upon receipt of a "typical [Discount Window] borrowing request," the Federal Reserve Banks would "review the request, verify collateral and, *if approved*, enter the loan in the Reserve Bank's loan and accounting system." Decl. of Brian F. Madigan ¶ 11 (emphasis added). Since approval is required for the loan, it follows that withholding approval would prevent it. In all the programs at issue, loans are made only upon the presentation of collateral when the loan is sought. *Id.*

Moreover, as Dr. Madigan also explained, apparently with regard to all lending programs, "the Federal Reserve Banks lend only against *acceptable* collateral." *Id.* (emphasis added). The Board may publish in advance the collateral coverage it will require, and some forms of collateral

are readily valued and presumptively acceptable; but collateral is scrutinized, the decision as to adequacy is made by the lender, and a loan is denied unless the collateral is acceptable. The acceptability of collateral may be readily anticipated by the borrower, and come as no surprise to either party, but it is not information that the borrower can be said to have generated or imparted to the lender.

In any case, even if the loans were granted automatically, they did not come into existence until the Federal Reserve Bank took executive action by granting the loan. The only information sought is a summary report of actions that were taken by the government. And it cannot be said that the government "obtained" information as to its own acts and doings from external sources or persons.

III

In the alternative, the Board argues that the information at issue was "obtained from" the Federal Reserve Banks, and that the Federal Reserve Banks themselves are "person[s]" under FOIA. However, even if the Federal Reserve Banks were defined as persons under FOIA,[2] the information passed from them to the Board would still be subject to disclosure unless it is "privileged or confi-

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[2] This would require a finding that a Federal Reserve Bank is not itself an agency: a "person" includes "an individual, partnership, corporation, association, or public or private organization *other than an agency*." 5 U.S.C. § 551(2) (emphasis added). Because we reject the Board's argument on a different ground, we need not decide that question.

dential" within the meaning of Exemption 4. *See Nadler*, 92 F.3d at 95.

We have stated that one way in which "information is confidential for the purposes of Exemption 4 [is] if its disclosure would have the effect . . . of causing substantial harm to the competitive position of the person from whom the information was obtained." *Inner City Press/Cmty. on the Move*, 463 F.3d at 244. The Board does not undertake to show that the Federal Reserve Banks are subject to competition, or that the disclosure of the requested information would cause competitive injury to the Federal Reserve Banks. *Cf. Nadler*, 92 F.3d at 95 (information must be privileged or confidential to be withheld under Exemption 4).

The only prejudice or harm claimed by the Board for itself (and the only issue of prejudice or harm we consider) is that disclosure would impair its mission—to furnish critical infusions to distressed banks on a confidential basis—and thereby prevent loss of confidence, bank runs, fluctuations of bank stock, and rippling harm to the banking system. We are therefore asked to extend the reach of Exemption 4 to encompass the so-called "program effectiveness" test, adopted by the First and District of Columbia Circuits, which allows agencies to withhold information as confidential under Exemption 4 if they believe that withholding it "serves a valuable purpose and is useful for the effective execution of its statutory responsibilities." *9 to 5 Org. for Women Office Workers v. Bd. of Governors of Fed. Reserve Sys.*, 721 F.2d 1, 11 (1st Cir.1983); *see also Critical Mass Energy Project v. Nuclear Regulatory*

Comm'n, 830 F.2d 278, 287 (D.C.Cir.1987) (adopting program effectiveness test), *overruled on other grounds by Critical Mass Energy Project v. Nuclear Regulatory Comm'n*, 975 F.2d 871, 879 (D.C.Cir.1992) (in banc).

The "program effectiveness" test, if applied as the Board invokes it, would give impermissible deference to the agency, and would be analogous to the "public interest" standard rejected by the Supreme Court in the context of Exemption Five. *See Fed. Open Market Comm. of Fed. Reserve Sys. v. Merrill*, 443 U.S. 340, 354, 99 S.Ct. 2800, 61 L.Ed.2d 587 (1979). In that case, the agency's "principal argument [was] that Exemption 5 confers general authority upon an agency to delay disclosure of intra-agency memoranda that would undermine the *effectiveness of the agency's policy* if released immediately." *Id.* at 353, 99 S.Ct. 2800 (emphasis added). The Supreme Court rejected that argument in terms that are instructive:

> [T]he [agency's] argument proves too much. Such an interpretation of Exemption 5 would appear to allow an agency to withhold any memoranda . . . whenever the agency concluded that disclosure *would not promote the "efficiency" of its operations or otherwise would not be in the "public interest."* This would leave little, if anything, to FOIA's requirement of prompt disclosure, and would run counter to Congress' repeated rejection of any interpretation of the FOIA which would allow an agency to withhold information on the basis of some vague "public interest" standard.

Id. at 354, 99 S.Ct. 2800 (emphasis added).

The "public interest" standard rejected in *Merrill* is the functional equivalent of the "program effectiveness" test, as the Board invokes it: the agency gets to withhold whatever it deems harmful to disclose-and an agency's decision as to its own mission and effectiveness is the kind of thing that ordinarily commands deferential review. The Board and the Clearing House undertake to show that disclosure would harm the banks that borrowed (by disclosing their prior distress) and the banking system as a whole (because banks under stress may hesitate to seek relief or rescue), and that these harms will reduce the effectiveness of measures critical to the banking system. The arguments are plausible, and forcefully made. But a test that permits an agency to deny disclosure because the agency thinks it best to do so (or convinces a court to think so, by logic or deference) would undermine "the basic policy that disclosure, not secrecy, is the dominant objective of [FOIA]." *See Rose*, 425 U.S. at 361, 96 S.Ct. 1592.

The requirement of disclosure under FOIA and its proper limits are matters of congressional policy. The statute as written by Congress sets forth no basis for the exemption the Board asks us to read into it. If the Board believes such an exemption would better serve the national interest, it should ask Congress to amend the statute.

* * *

For the foregoing reasons, the judgment of the district court is affirmed.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan Courthouse, 500 Pearl Street, in the City of New York, on the 20th day of August, two thousand and ten.

Docket No. 09-4083-cv, 09-4097-cv(CON)

Filed: August 20, 2010

BLOOMBERG, L.P.,

Plaintiff-Appellee,

—v.—

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM,

Defendant-Appellant,

and

THE CLEARING HOUSE ASSOCIATION L.L.C.,

Intervenor-Appellant.

The Clearing House Association L.L.C. having filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*, and the panel that determined the appeal having considered the request for panel rehearing, and the active members of the Court having considered the request for rehearing *en banc*,

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:

/s/ Catherine O'Hagan Wolfe
Catherine O'Hagan Wolfe, *Clerk*

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan Courthouse, 500 Pearl Street, in the City of New York, on the 20th day of August, two thousand and ten.

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BLOOMBERG, L.P.,

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BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM,

Defendant-Appellant,

and

THE CLEARING HOUSE ASSOCIATION L.L.C.,

Intervenor-Appellant.

Board of Governors of the Federal Reserve System having filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*, and the panel that determined the appeal having considered the request for panel rehearing, and the active members of the Court having considered the request for rehearing *en banc*,

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:

/s/ Catherine O'Hagan Wolfe
Catherine O'Hagan Wolfe, *Clerk*

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. 08 Civ. 9595 (LAP)

August 24, 2009

BLOOMBERG, L.P.,

Plaintiff,

—v.—

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM,

Defendant.

SCOTT SANFORD ROSE, THOMAS H. GOLDEN, JARED ERROL COHEN, Willkie Farr & Gallagher LLP, New York, NY, *for Plaintiff.*

YVONNE FACCHINA MIZUSAWA, Board of Governors of the Federal Reserve System, Washington, DC, *for Defendant.*

OPINION AND ORDER

LORETTA A. PRESKA, *Chief Judge*.

This action concerns whether the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, compels the Board of Governors of the Federal Reserve System (the "Board"), when responding to FOIA requests, to search for records held at the Federal Reserve Bank of New York ("FRBNY") and the applicability of FOIA Exemptions 4 and 5 to certain records currently in the Board's possession. This dispute first arose when Bloomberg L.P. ("Bloomberg") reporters Mark Pittman and Craig Torres each submitted FOIA requests (the "FOIA Requests") to the Board requesting information about the Federal Reserve System's extraordinary actions taken in early 2008, during one of the worst financial crises in the history of this nation. In response to the FOIA Requests, the Board conducted an internal search for records held by the Board only, identified certain documents as responsive to the FOIA Requests, but withheld those documents pursuant to FOIA Exemptions 4 and 5. Bloomberg sued to compel the disclosure of the documents and to require the Board also to search records held at the FRBNY.

Both Bloomberg and the Board now move for summary judgment on those issues [*see* dkt. nos. 10 and 18]. For the reasons set forth herein and as detailed below, Bloomberg's motion is GRANTED, and the Board's motion is DENIED.

I. *BACKGROUND*

A. Overview and Lead-Up to the FOIA Requests

A brief overview of the Federal Reserve System structure is helpful for understanding the circumstances of this action. The Federal Reserve System is the Central Bank of the United States. It is composed of the Board, located in Washington, D.C., and twelve regional Federal Reserve Banks (the "FRBs"). *The Federal Reserve System: Purposes and Functions* 3 (9th ed., June 2005) [hereinafter *P & F*]. Collectively, the Board and the FRBs fulfill the four overriding purposes of the Federal Reserve System: conducting the nation's monetary policy, supervising and regulating banking institutions, maintaining the stability of financial systems and markets, and providing financial services to major financial actors. *See id.* at 1-2. The Federal Reserve System considers itself to be an independent central bank because its decisions do not require ratification by the President or executive branch officials. *Id.* at 3. The System is, however, subject to oversight by Congress. *Id.*

While together the Board and the FRBs comprise the Federal Reserve System, they have independent mandates and responsibilities. The Board is a federal agency tasked with, *inter alia*, supervising or regulating the operations of the FRBs, reviewing and approving changes to interest rates charged by the FRBs and overseeing loans among and by the FRBs. *Id.* at 4; *see also* 12 U.S.C. § 248. An additional component of the Federal Reserve System is the Federal Open Market Committee

("FOMC"), a separate governmental agency that shares offices with the Board. *See* 12 U.S.C. § 263. The FOMC is made up of the members of the Board, the president of the FRBNY, and presidents of four other FRBs, who serve on a rotating basis. *P & F* at 3. "The FOMC oversees open market operations, which is the main tool used by the Federal Reserve to influence overall monetary and credit conditions." *Id.*

The FRBs, on the other hand, are semi-autonomous institutions with private funding and independent corporate structures.[1] Congress chartered the FRBs and granted them distinct powers, apart from the powers granted to the Board, such as the power to sue and be sued in their own names, to make contracts, to appoint officers, hire and fire employees and prescribe bylaws through their boards of directors. *See* 12 U.S.C. §§ 341-361. FRBs do not receive appropriated funds from Congress but rather generate funds from stock issuances to depository institutions in their districts. *See* 12 U.S.C. §§ 222, 282, 321, 341. Each FRB has a nine member board of directors, six of whom are elected by shareholder banks within the FRB's district and three appointed by the Board. *See* 12 U.S.C. §§ 301-302. The FRBs' role within the Federal Reserve System is generally supportive of the Board, "carrying out a variety of System functions, including operating a nationwide payments system, distributing the nation's currency and coin, supervising and regulating

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[1] Statutes and regulations often refer to the FRBs as "fiscal agents" of the Government. *See, e.g.*, 12 U.S.C. § 391; 31 C.F.R. § 210.7.

member banks and bank holding companies, and serving as banker for the U.S. Treasury." *P & F* at 4. The FRBs give all revenue in excess of expenses to the U.S. Treasury. 12 U.S.C. § 289.

A central feature of the FRBs is their administration of the discount window lending program ("DW"), meant to relieve pressures on the interbank funds market and a means for providing emergency liquidity to qualifying depository institutions during times of systemic stress. (*See* Decl. of Susan E. McLaughlin ¶ 5.) "Access to discount window credit is established by rules set by the [Board], and loans are made at interest rates set by the [FRBs] and approved by the Board. Depository institutions decide to borrow based on the level of the lending rate and their liquidity needs." *P & F* at 31. While the Board regulates DW lending, *see* 12 U.S.C. § 347b, the Board has no input or involvement in the administration of specific DW loan requests. (Decl. of Susan E. McLaughlin ¶ 8.) FRBs publish DW interest rates, but information on the names of depository institution borrowers, collateral pledged by the borrowers, individual loan amounts, or the specific type of DW program borrowed from is not publicly disclosed. (*Id.* ¶ 9.) At least with respect to the FRBNY, loan and collateral documentation relating to each DW loan is maintained at the bank, and that information is maintained on a need-to-know basis. (*Id.*)

In 2007, the U.S. economy encountered a serious financial crisis. In late 2007, responding to deteriorating market conditions, the Board authorized the FRBs to establish a new lending facility for depository institutions called the Term Auction

Facility ("TAF"). (Decl. of Brian F. Madigan ¶ 7.) In March 2008, the Board also authorized only the FRBNY to create additional lending programs to give primary dealers access to liquidity: the Primary Dealer Credit Facility ("PDCF") and the Term Securities Lending Facility ("TSLF"). (*Id.*; Decl. of Susan E. McLaughlin ¶ 10.) The FRBNY does not publish any information on PDCF loans, other than aggregate information on PDCF borrowing. (Decl. of Susan E. McLaughlin 16.) Information about the other lending programs is maintained internally at the FRBNY or, in the case of TAF loans, internally at each FRB. (Decl. of Brian F. Madigan ¶ 12.)

In March 2008, Bear Stearns, one of the largest securities firms in the United States, notified members of the Federal Reserve that due to deteriorating market conditions it would be unable to repay a large portion of its obligations and thus faced the prospect of filing for bankruptcy protection. On Friday, March 14, 2008, in order to avoid serious harm to the financial markets if Bear Stearns collapsed, the Board authorized the FRBNY to extend credit to Bear Stearns through JPMorgan Chase Bank, N.A. ("JPMC"). That day, the FRBNY made an overnight DW loan of $12.9 billion to JPMC and took as collateral Bear Stearns assets with a value of $13.8 billion. On Monday, March 17, 2009, JPMC and Bear Stearns repaid the FRBNY the $12.9 billion loan in full with interest of nearly $4 million.[2]

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[2] *See* Press Release, Federal Reserve System, *Report Pursuant to Section 129 of the Emergency Economic Stabilization Act of 2008: Bridge Loan to the Bear Stearns Com-*

The Board is subject to the Freedom of Information Act, promulgates regulations regarding FOIA compliance, and maintains designated personnel to respond to FOIA requests. *See* 12 C.F.R. §§ 261.12-.17. The FOMC also considers itself a separate governmental agency for FOIA purposes and publishes FOIA regulations. *See* 12 U.S.C. § 263; 12 C.F.R. §§ 271.1-271.9. The FRBs, however, consider themselves private corporations and issue no published FOIA regulations.

B. The Loan Request

On May 21, 2008, Bloomberg reporter Mark Pittman submitted to the Board a FOIA request (the "Loan Request") seeking:

> For all securities posted between April 4, 2008 and May 20, 2008 as collateral to the Primary Dealer Credit Facility, the discount window, the Term Securities Lending Facility, and the Term Auction Facility (the "Relevant Securities"), we request copies of:
>
> > 1. all forms and other documents submitted by the party posting the Relevant Securities as part of the application for the loan;
> >
> > 2. all receipts and other documents given to the party posting the Relevant Securities as part of the application for the loan;
> >
> > 3. records sufficient to show the names of the Relevant Securities;

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panies Inc. Through JPMorgan Chase Bank, N.A. (undated), *available at* http://www.federalreserve.gov/monetarypolicy/files/129bearstearnsbridgeloan.pdf.

> 4. records sufficient to show the dates that the Relevant Securities were accepted and the dates that the Relevant Securities were redeemed;
>
> 5. records sufficient to show the amount of borrowing permitted as compared to the face value, also known as the "haircut";
>
> 6. records sufficient to describe whether valuations or "haircuts" for the Relevant Securities changed over time;
>
> 7. records sufficient to show the terms of the loans and the rates that the borrowers must pay;
>
> 8. records sufficient to show the amount that the Federal Reserve has accepted of each of the Relevant Securities;
>
> 9. records sufficient to show which, if any, Relevant Securities have been rejected as collateral and the reasons for the rejections;
>
> 10. all databases and spreadsheets that list or summarize the Relevant Securities; and
>
> 11. records, including contracts with outside entities, that show the employees or entities being used to price the Relevant Securities and to conduct the process the lending.

(Decl. of Alison M. Thro ("Thro Decl.") ¶ 5, Ex. 1.) On June 19, 2008, the Board sent Bloomberg a letter extending the Board's period to respond to the

Loan Request until July 3, 2008, "in order to consult with another agency or with two or more components of the Board having a substantial interest in the determination of the request." (*Id.* ¶ 6, Ex. 3.)

Alison M. Thro, Senior Counsel of the Board and a member of its Legal Division, searched for documents responsive to the Loan Request by contacting seven staff members in the Board's division of Monetary Affairs ("MA"), including the MA director, deputy director, senior associate director and deputy associate director. The MA provides the Board with information and analysis pertaining to the FRBs' administration of the DW, TAF, PDCF and TSLF lending programs. (*Id.* ¶ 8.) An MA staff member informed Ms. Thro of the existence of a document potentially responsive to item 11 of the Loan Request, identifying an external firm from which the FRBs purchase pricing data. (*Id.* ¶ 15.) Other MA staff members informed Ms. Thro that during the Loan Request time period, the FRBs sent daily data feeds (weekdays only) to the MA, consisting of transaction-level information about the DW, TAF, PDCF and TSLF programs. MA staff used this data to generate daily reports (weekdays only) that listed outstanding extensions of credit under the DW, TAF, PDCF and TSLF programs (the "Remaining Term Reports").

The Remaining Term Reports consist of 231 pages of information and include the names of borrowers, the originating FRB district, individual loan amounts, the type of lending program borrowed from, and loan origination and maturity dates. (*Id.* ¶¶ 11, 13; Board's Local Rule 56.1 Stmt.

¶ 5.) The Remaining Term Reports do not identify the interest rates on the loans, specific items of collateral pledged for the loans, the haircuts applied to the collateral, or other information responsive to the Loan Request. (Thro Decl. ¶ 11.)

Ms. Thro also contacted six staff members in the Reserve Bank Operations and Payment Systems ("RBOPS") division of the Board, which oversees the FRBs' provision of financial services to depository institutions and other eligible borrowers. (*Id.* ¶ 17.) Ms. Thro found that the RBOPS staff members had no responsive documents, other than the Remaining Term Reports and the document potentially responsive to item 11 of the Loan Request. The MA and the RBOPS were the only two divisions of the Board Ms. Thro considered reasonably likely to have responsive documents "because no other division [of the Board] had responsibility directly to oversee the Reserve Banks' provision of DW, TAF [, PDCF and TSLF] services to eligible institutions or to provide data and statistics to Board staff relating to" those lending programs. (Board's Local Rule 56.1 Stmt. ¶ 3; Thro Decl. ¶ 18.)

Ms. Thro also interviewed certain staff of the FRBNY but did not search any records at the FRBNY because she "determined that [ ] transaction-level documents at the FRBNY were not records of the Board subject to FOIA." (Thro Decl. ¶ 21.)

On December 9, 2008 (after Bloomberg filed its Complaint and Amended Complaint in this action), the Board sent Bloomberg a letter granting in part and denying in part the Loan Request. The Board stated that it located documents

responsive to item 11 of the Loan Request and offered to provide those documents. The Board also stated that it had located approximately 231 pages of responsive documents (the Remaining Term Reports) but stated that it would withhold that information pursuant to FOIA Exemptions 4 and 5.[3] The Board also stated its view that documents held by the FRBNY are not subject to FOIA request made to the Board. (*Id.*, Ex. 5.)

C. The Bear Request

On April 7, 2008, Bloomberg reporter Craig Torres submitted a FOIA request (the "Bear Request") to the Board requesting "[a]ll documents reflecting or concerning the portfolio of securities (listed on a security-by-security basis, with CUSIP numbers if available), supporting the loan extended by the Federal Reserve in connection with the proposed acquisition of Bear Stearns Cos. by JP Morgan Chase & Co." (*Id.* ¶ 22, Ex. 6.)

In planning a search for documents related to the Bear Request, Ms. Thro was aware of an extant electronic document repository that had been created after the Board's March 14, 2008 authorization of the Bear Stearns loan. (*Id.* ¶ 23.) The Board had created the document repository in order to respond to other FOIA requests and Congressional requests for information related to the Bear Stearns loan. Before the Board received the Bear Request, the developers of the document

[3] The Board presumably also provided around this time an index describing the withheld documents and the exemptions invoked, in accordance with *Vaughn v. Rosen*, 484 F.2d 820 (D.C.Cir.1973). (*See* Thro Decl., Ex. 4.)

repository had already contacted approximately 80 Board staff members in seven divisions (MA, RBOPS, Office of Board Members, Office of Secretary, Legal, International Finance, and Bank Supervision and Regulation) who were identified as having been involved in any aspect of the Bear Stearns loan matter. By interviewing core staff members involved in the Bear Stearns loan matter and asking them to identify other individuals who were involved, Ms. Thro, who was among the developers of the document repository, was satisfied that she had identified all staff members likely to have relevant documents. By the end of June 2008, the document repository contained over 28,000 pages of information, and Ms. Thro considered it to be a comprehensive gathering of all documents related to the Bear Stearns matter. (*Id.* ¶¶ 24-25.) Staff members were also reminded of their continuing obligation to send to the repository any laterdiscovered documents related to the Bear Stearns matter. (*Id.* ¶ 24.)

In order to respond to the Bear Request specifically, Ms. Thro reviewed documents in the repository that came from Board members and Board staff members (approximately 34 in all) who she considered most likely to have had documents relating to securities pledged as collateral for the Bear Stearns Loan. Ms. Thro concluded that no repository records "contain[ed] any transaction-specific documents regarding securities posted as collateral for the Bear Stearns Loan." (*Id.* ¶ 25.) Ms. Thro also reinterviewed MA and RBOPS staff members about whether they had any additional documents related to the Bear Stearns matter but received no responsive documents. (*Id.* ¶ 26.)

Finally, Ms. Thro consulted with FRBNY staff members about documents they maintained regarding the Bear Stearns matter but concluded that any such documents "were proprietary records of the Reserve Bank, and not Board records subject to FOIA." (*Id.* ¶ 27.)

On September 30, 2008, the Board responded to the Bear Request by sending Bloomberg a denial letter, stating "Staff searched Board records and made suitable inquiries, but found no documents that are responsive to your request." (*Id.* ¶ 29, Ex. 7.) The denial letter also stated,

> Staff has confirmed that documents responsive to your request are located at the Federal Reserve Bank of New York. I have determined that these documents are not "records of the Board" under the Act. Nevertheless, even if they were deemed to be "records of the Board," I have confirmed that the documents would be exempt in full from disclosure under exemption 4 of the Act.

(*Id.* ¶ 29, Ex. 7.) On October 14, 2008, Bloomberg appealed the denial to the Board. On November 7, 2008, the Board responded to the appeal by sending Bloomberg a denial letter, stating,

> the [FRBNY] obtained the documents as part of its administration of a loan extended by the [FRBNY] to facilitate the acquisition of Bear Stearns by J.P. Morgan Chase & Co. (JPMC). Although the loan was made under emergency and other circumstances necessitating Board involvement, these circumstances did not convert an otherwise commercial action into a Board (agency) function. At no time did the

> Board or Board staff obtain, review, or rely upon these documents. Accordingly, I conclude that the documents are not 'records of the Board' subject to the Act.

(*Id.* ¶ 29, Ex. 7.) The denial letter also reiterated that even if the documents at the FRBNY were considered records of the Board, the Board considered them exempt under Exemptions 4 and 5.

Bloomberg now sues the Board to force compliance with the FOIA Requests.

II. *DISCUSSION*

A. Jurisdiction

Subject matter jurisdiction is proper pursuant to 28 U.S.C. § 1331 because this action arises under the laws of the United States. Also, this Court has jurisdiction to order injunctive relief against the Board pursuant to 5 U.S.C. § 552(a)(4)(B) because Bloomberg has its principal place of business in this district and the Board has improperly withheld agency records from Bloomberg, as explained more fully below.

B. Legal Standards

When responding to a FOIA request, a federal agency must (1) conduct an adequate search using reasonable efforts, (2) provide the information requested, unless it falls within a FOIA Exemption, and (3) provide any information that can reasonably be segregated from the exempt information. 5 U.S.C. §§ 552(a)(3), 552(b). FOIA generally requires complete disclosure of requested agency information unless the information falls

into one of FOIA's nine clearly delineated exemptions. 5 U.S.C. § 552(b); *see also Dep't of Air Force v. Rose*, 425 U.S. 352, 360-61, 96 S.Ct. 1592, 48 L.Ed.2d 11 (1976) (discussing the history and purpose of the FOIA and the structure of FOIA exemptions). In light of FOIA's goal of promoting a general philosophy of full agency disclosure, the exemptions are construed narrowly. *United States Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 151, 109 S.Ct. 2841, 106 L.Ed.2d 112 (1989); *Associated Press v. United States Dep't of Defense*, 554 F.3d 274, 283-84 (2d Cir.2009).

As with all motions for summary judgment, summary judgment in a FOIA action should be granted only if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *See* Fed.R.Civ.P. 56(c); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). Summary judgment is the preferred procedural vehicle for resolving FOIA disputes. *See Amnesty Int'l USA v. CIA*, 07 Civ. 5435, 2008 WL 2519908, at *8 (S.D.N.Y. June 19, 2008). "[T]he strong presumption in favor of disclosure places the burden on the agency to justify the withholding of any requested documents." *United States Dep't of State v. Ray*, 502 U.S. 164, 173, 112 S.Ct. 541, 116 L.Ed.2d 526 (1991). First, the agency has the burden to show that it conducted an adequate search for responsive records. *Carney v. United States Dep't of Justice*, 19 F.3d 807, 812 (2d Cir.1994). A search will be considered adequate if it was reasonably calculated to uncover all relevant documents. Reasonableness does not demand perfection, and a reasonable search need not

uncover every document extant. *Grand Cent. Partnership, Inc. v. Cuomo*, 166 F.3d 473, 489 (2d Cir.1999).

The agency's burden to show it conducted an adequate search may be satisfied by submitting affidavits or declarations "indicating that the agency has conducted a thorough search and giving reasonably detailed explanations why any withheld documents fall within an exemption." *Carney*, 19 F.3d at 812. "Affidavits submitted by an agency are accorded a presumption of good faith; accordingly, discovery relating to the agency's search and the exemptions it claims for withholding records generally is unnecessary if the agency's submissions are adequate on their face." *Id.* (internal quotation marks and citation omitted). However, such declarations must be non-conclusory.[4] Once the agency satisfies its burden of showing that it conducted an adequate search, the burden shifts to the plaintiff to make a showing of bad faith sufficient to impugn the agency's showing. *Id.*; *see also Triestman v. United States Dep't of Justice*, 878 F.Supp. 667, 672 (S.D.N.Y. 1995).

An agency also bears the burden of showing that withheld responsive information falls within one of FOIA's nine exemptions. 5 U.S.C. § 552(a)(4)(B). "FOIA specifies that a district court must conduct *de novo* review of an agency's claims to exemptions," *Lee v. Fed. Deposit Ins. Corp.*, 923 F.Supp.

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[4] "Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." Fed.R.Civ.P. 56(e).

451, 453 (S.D.N.Y.1996), which "are to be narrowly construed with all doubts resolved in favor of disclosure," *Grand Cent.*, 166 F.3d at 478 (internal quotation marks omitted). An agency must show with "reasonable specificity" that withheld information falls within a FOIA exemption; conclusory or speculative assertions in support of an exemption are insufficient. *Halpern v. F.B.I.*, 181 F.3d 279, 286, 293 (2d Cir.1999); *see also* Part II.E.i.b, *infra*, at p. 279 (discussing an agency's burden of showing that FOIA Exemption 4 applies). "[S]ummary judgment in favor of the FOIA plaintiff is appropriate [w]hen an agency seeks to protect material which, even on the agency's version of the facts, falls outside the proffered exemption.' " *New York Times Co. v. United States Dep't of Defense*, 499 F.Supp.2d 501, 509 (S.D.N.Y.2007) (internal quotation marks omitted). Finally, an agency may not withhold entire documents or broad categories of documents when only a segregable portion is exempt from disclosure. 5 U.S.C. § 552(b).

C. Adequacy of the Board's Searches

Bloomberg does not contest the adequacy of the Board's search of its own records in response to the FOIA Requests. Rather, Bloomberg argues that by not searching any records at the FRBNY, the Board's search was inadequate because (i) Board regulations qualify certain records held at the FRBNY as agency records of the Board and (ii) the FRBNY was acting on behalf of the Board, thus qualifying all FRBNY records as constructively obtained and controlled by the Board. Addi-

tionally, Bloomberg contends that the FRBNY is itself an agency for FOIA purposes.

The Board concedes that the regulations qualify at least some records held at the FRBNY as agency records of the Board but interprets the regulations so narrowly that no records held at the FRBNY would be responsive to the FOIA Requests. Next, the Board disputes the application of Bloomberg's constructive obtainment and control theory. Finally, the Board argues that the question of whether the FRBNY is an agency for FOIA purposes is not relevant to this action and need not be decided.

As explained more fully below, the Board regulations specify that certain records kept at the FRBNY are agency records of the Board. Those records must be searched. Bloomberg's constructive obtainment and control theory is rejected. Finally, the Court agrees that the FRBNY's status as an agency for FOIA purposes is irrelevant to the issue of the adequacy of the Board's search.

(i) Board Regulations Establish that Certain Records at the FRBNY are Agency Records of the Board.

FOIA empowers district courts to order the production of (1) improperly (2) withheld (3) agency records, in response to a FOIA request. 5 U.S.C. § 552(a)(4)(B). Unless each of the three § 552(a)(4)(B) criteria are met, "a district court lacks jurisdiction to devise remedies to force an agency to comply with the FOIA's disclosure requirements." *Tax Analysts*, 492 U.S. at 142, 109 S.Ct. 2841; *see also Grand Cent.*, 166 F.3d at 478.

The Board concedes that certain records at the FRBNY qualify as agency records of the Board. (*See* Board Br. at 40 ("By regulation, a very narrow category of documents located at the [FRBs] are 'Board Records' subject to FOIA.").) Thus, the central inquiry at this stage is to determine which records at the FRBNY qualify as agency records of the Board so as to be within the scope of records potentially responsive to the FOIA Requests. The Supreme Court has articulated a two-part test for determining what records constitute "agency records" for FOIA purposes: (1) records either created or obtained by the agency to which the FOIA request was made and (2) records under that agency's control at the time the FOIA request is made. *Tax Analysts*, 492 U.S. at 144-45, 109 S.Ct. 2841. Regulations promulgated by an agency may be helpful in determining what constitutes the agency's "agency records" for FOIA purposes.[5]

Regulations promulgated by the Board, in order to comply with the Board's FOIA obligations (the "Regulations"),[6] state that the "Secretary of the

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[5] The parties have not brought to this Court's attention any authority explaining the extent to which an agency's FOIA regulations may impact the agency's statutorily imposed FOIA obligations. It seems beyond cavil that an agency may promulgate regulations expanding the scope of information that FOIA would otherwise define as the agency's "agency records." But because district courts are tasked with resolving FOIA controversies upon *de novo* review, determining the province of an agency's "agency records" falls ultimately to the courts. *See* 5 U.S.C. § 552(a)(4)(B).

[6] *See* 12 C.F.R. § 261.1(c)(2) ("[T]his [sub]part implements the Freedom of Information Act (FOIA).").

Board [ ] is the official custodian of all *Board records, including records that are in the possession or control of* the Board, *any Federal Reserve Bank,* or any Board or Reserve Bank employee." 12 C.F.R. § 261.3(a) (emphasis added). The plain language definition of "custodian" is "one that guards and protects or maintains." Webster's Third New International Dictionary Unabridged (2009); *see also* Oxford English Dictionary (2009) ("One who has the custody of a thing."). Thus, according to the plain language of its own Regulations, the Board, by way of the Secretary of the Board, obtains and controls records in the possession or control of the FRBs, and those records qualify as "agency records" for purposes of FOIA requests addressed to the Board.

However, not *all* records at the FRBs are within the custody of the Secretary of the Board because the Regulations elsewhere limit the scope of "Board records," as used in § 261.3(a), to a subset of documents in the possession or control of the FRBs. The Regulations use the terms "Board records" and "Records of the Board" interchangeably, thus the Court looks to the definition of "Records of the Board" for purposes of defining Board records. "Records of the Board" are defined as:

> (i) In written form, or in nonwritten or machinereadable form; *all information coming into the possession and under the control of* the Board, any Board member, *any Federal Reserve Bank,* or any officer, employee, or agent of the Board or of any Federal Reserve Bank, *in the performance of functions for or on*

> *behalf of the Board* that *constitute part of the Board's official files;* or
>
> (ii) That are *maintained for administrative reasons in the regular course of business in official files in* any division or office of the Board or *any Federal Reserve Bank in connection with the transaction of any official business.*

12 C.F.R. § 261.2(i)(1) (emphasis added).

Although hardly a model of grammatical clarity, § 261.2(i)(1) certainly establishes criteria for determining which records at FRBs qualify as Records of the Board—*viz.*, records (1) constituting a part of the Board's official files and (2) maintained in the performance of functions for or on behalf of the Board (§ 261.2(i)(1)(i)), *or* records (1) maintained for administrative reasons, (2) in the regular course of business, (3) in the Board's official files, and (4) in connection with the transaction of any official business (§ 261.2(i)(1)(ii)). "[O]fficial files," as used in §§ 261.2(i)(1)(i) and 261.2(i)(1)(ii), is defined as "the Board's central records." 12 C.F.R. § 261.2(a).

In this action, instead of focusing on the "official files" criterion, the parties spar over the "for or on behalf of the Board" criterion. The Board contends that "for or on behalf of" actually means "under delegated authority from the Board." (Board Br. at 41-46 & n. 13; Board Reply Br. at 8; Supp. Thro Decl. ¶¶ 3-5.) Bloomberg disagrees and contends that the Board's idiosyncratic interpretation should not be adopted. Ultimately, this disagreement need not be resolved because if a record is kept in *the Board's official files* at a FRB, the Sec-

retary of the Board is its official custodian, regardless of its subject matter, and thus it qualifies as a Board "agency record." *See* 12 C.F.R. § 261.3(a).[7]

The Board has not conducted an adequate search of its agency records because the Board did not search *any* FRBNY records. In other words, the Board improperly withheld agency records in response to a FOIA request by conducting an inadequate search. 5 U.S.C. § 552(a)(4)(B). The Board shall search forthwith records at the FRBNY that constitute "Records of the Board" within the meaning of 12 C.F.R. § 261.2(i)(1). So long as records at the FRBNY satisfy the plain language meaning of § 261.2(i)(1), they qualify as agency records of the Board and are subject to FOIA requests. The parties shall confer following their review of the results of the search and inform the Court by letter no later than September 14, 2009 how they propose to proceed.

(ii) Constructive Obtainment and Control Theory

Bloomberg also argues that *all* FRBNY records are agency records of the Board because "[i]f a government contractor performs a task on behalf of the government, the records relating to the task are 'agency records.'" (Bloomberg Br. at 17 n. 9.)

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[7] While of course the Court strives to attach significance to each 12 C.F.R. § 261.2(i)(1) criterion, a plain language interpretation of § 261.2(i)(1) leads to the only logical conclusion that so long as a record is maintained in Board official files, *anywhere*, the purpose or subject matter of that record is immaterial for purposes of qualifying it as a Board record.

Bloomberg includes this argument in the section of its Memorandum titled "Reserve Banks Are Agencies And Therefore Their Records Are Subject To FOIA" but apparently assumes, for the sake of this argument, that the FRBNY is a "private party." *Id.* Thus, for purposes of this argument, this Court assumes that the FRBNY is not an agency. For a more complete discussion of that issue, see Part II.D, *infra*, at page 276 and especially note 11.

Bloomberg cites *Burka v. United States Dep't of Health and Human Servs.*, 87 F.3d 508, 515 (D.C.Cir.1996), and *In Defense of Animals v. Nat'l Inst. of Health*, 543 F.Supp.2d 70, 77 (D.D.C.2008), which it contends recognized a constructive obtainment and control theory for purposes of classifying agency records under FOIA.[8] Briefly, the theory is rooted in the notion that an agency may exercise such supervision or control over another entity that the entity's records constructively become the agency's records, irrespective of whether the agency actually obtained or availed itself of the records. *Burka*, 87 F.3d at 515. The theory incorporates a four-factor analysis: "(1) the intent of the document's creator to retain or relinquish control over the records; (2) the ability of the agency to use and dispose of the record as it sees fit; (3) the extent to which agency

[8] Although not cited by Bloomberg, the Court notes that the Northern District of Illinois has also considered *Burka* and applied a constructive creation and control theory. *See Chicago Tribune Co. v. United States Dep't of Health and Human Servs.*, No. 95 C 3917, 1997 WL 1137641, at *13 (N.D.Ill. March 28, 1997). This Court considered that decision in reviewing Bloomberg's arguments.

personnel have read or relied upon the document; and (4) the degree to which the document was integrated into the agency's record system or files." *Id.* (internal quotation marks omitted). Bloomberg also states, without supporting authority, that "Congress never intended to allow government agencies to arbitrarily keep their decisions and actions secret by outsourcing government business." (Bloomberg Br. at 17-18 n. 9.)

While Bloomberg implies that FOIA compels the acceptance of the constructive obtainment and control theory and that the theory is consistent with the Supreme Court's two-part agency records test, as set forth in *Tax Analysts*, 492 U.S. at 144-45, 109 S.Ct. 2841, Bloomberg cites no decisions from this Circuit applying the *Burka* theory. *Tax Analysts* teaches that agency records are (1) records either created or obtained by the agency to which the FOIA request was made and (2) records under that agency's control at the time of the FOIA request. The obtainment prong includes a broad swath of materials because "agencies routinely avail themselves of studies, trade journal reports, and other materials produced outside the agencies both by private and governmental organizations." *Id.* at 144, 109 S.Ct. 2841. While the Supreme Court has declined to "categorize what agency conduct is necessary to support a finding that [the agency] has 'obtained' documents," it has determined that an agency's right to obtain another entity's documents and an agency's mere supervision over a federally-funded entity are insufficient findings to satisfy the obtainment prong of the test. *Forsham v. Harris*, 445 U.S. 169, 186 & n. 17, 100 S.Ct. 977, 63 L.Ed.2d 293 (1980).

Rather, "FOIA applies to records which have been *in fact* obtained." *Id.* at 185-6, 100 S.Ct. 977 (emphasis in original).[9] As to the control prong of the test, the Supreme Court held, "[b]y control we mean that the materials have come into the agency's *possession* in the legitimate conduct of its official duties." *Tax Analysts*, 492 U.S. at 145, 109 S.Ct. 2841 (emphasis added). That is not to say that mere physical presence within an agency is insufficient to qualify a record as an agency record, *see Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 157, 100 S.Ct. 960, 63 L.Ed.2d 267 (1980), but possession is certainly a prerequisite.

Burka, on the other hand, involved an instance where the responding agency never had possession or availed itself of an entity's records, yet the court qualified them as agency records for FOIA purposes. Specifically, the court held that data tapes created and possessed by a non-agency government contractor qualified as agency records because the contractor "acted on behalf of [the responding agency] in creating the tapes," evidenced by "the extensive supervision and control exercised by the agency over collection and analysis." 87 F.3d at 515. The court concluded that the

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[9] It must also be noted that the Supreme Court has said, "[r]ecords of a nonagency certainly could become records of an agency as well," but the Supreme Court provides little guidance for determining when and how this might occur. *See Forsham*, 445 U.S. at 181, 100 S.Ct. 977; *see also Tax Analysts*, 492 U.S. at 144, 109 S.Ct. 2841 (quoting *Forsham*).

agency had "constructive control" of the data tapes. *Id.*[10]

The Supreme Court's teachings in *Tax Analysts*, *Forsham*, and *Kissinger* certainly do not compel adoption of the constructive obtainment and control theory, and thus this Court declines to do so under the facts presented here. Accordingly, this Court rejects the theory that all records in the possession or control of the FRBNY qualify as agency records of the Board merely because the FRBNY may have acted on the Board's behalf. As described above, the Board shall search only those records in the possession or control of the FRBNY that qualify as Board records pursuant to Board Regulations. *See* Part II.C.i, *supra*.

D. The FRBNY as FOIA Agency

Bloomberg also raises the question of whether the FRBNY is an agency for FOIA purposes. (Bloomberg Br. at 17-19; Bloomberg Supp. Br. 1-5.) The Board, on the other hand, adamantly maintains that that question is not relevant and need not be decided. (Board Reply. Br. at 9; Board Supp. Br. at 1.) Bloomberg contends that the question is relevant because "the [FRBNY] is an

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[10] Bloomberg also contends that *NIH* embraces the constructive creation and control theory. But that case involved different factual circumstances from *Burka*. There, the responding agency actually owned the facilities where the requested records were stored and the agency hired a contractor to create and maintain records concerning studies on chimpanzees owned by the agency. *NIH*, 543 F.Supp.2d at 77. Thus, while *NIH* purportedly relied on *Burka*, the constructive creation and control theory was only of marginal significance in that decision. *Id.*

agency and has not promulgated its own FOIA regulations, [thus] those documents [at the FRBNY] are accessible through requests to the Board." (Bloomberg Reply Br. at 3.)

Bloomberg's logic is flawed. Bloomberg does not explain how the FRBNY's status as a FOIA agency implicates the Board's search of its agency records. FOIA imposes on each federal agency an obligation to search only its own agency records. 5 U.S.C. § 552(a)(3)(A). Bloomberg did not serve a FOIA request on the FRBNY. And Bloomberg does not contend that the FRBNY and the Board are actually one-and-the-same agency. As such, this Court agrees with the Board; Bloomberg's argument that the FRBNY is an agency for FOIA purposes has no bearing on the issue of the adequacy of the Board's search of its own agency records.

On the other hand, it seems that the question of the FRBs' status as agencies is indeed relevant to the applicability of the two FOIA exemptions invoked by the Board in this action. *See* pp. 277 n. 12 (in the context of Exemption 4), 281 (in the context of Exemption 5), *infra*. Nevertheless, as explained more fully below, answering that question is ultimately not necessary to determine this action.[11]

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[11] In some instances, in order to reach a dispositive issue, it may be appropriate to assume that the FRBs are agencies. Other Courts in this district have assumed, without deciding, that FRBs are agencies in order to evaluate the enforceability of a FOIA request. *See, e.g., Sibille v. Federal Reserve Bank of New York*, 770 F.Supp. 134, 137-38 (S.D.N.Y.1991) (assuming that the FRBNY is an agency but determining that an FRBNY's employee's logs were not used by the agency and thus were not within the scope of the

E. The Remaining Term Reports were Improperly Withheld Under FOIA Exemptions 4 and 5.

As noted above, in its December 9, 2008 Letter and *Vaughn* Index, the Board informed Bloomberg that it had located documents (the Remaining Term Reports) responsive to the Loan Request but that those documents were being withheld pursuant to FOIA Exemptions 4 and 5. Bloomberg contends that the Remaining Term Reports were improperly withheld because FOIA Exemptions 4 and 5 do not apply. Specifically, Bloomberg argues that invocation of Exemption 4 fails because the Board cannot meet its burden of showing that it obtained the Remaining Term Reports from a person or that their disclosure would cause substantial competitive harm to Federal Reserve System borrowers. Bloomberg argues that invocation of Exemption 5 fails because the Board has pointed to no recognized privilege in civil discovery that would protect the Remaining Term Reports from disclosure. The Board contends, not surprisingly, that the Remaining Term Reports were properly withheld under FOIA Exemptions 4 and 5. As explained below, neither exemption applies to the Remaining Term Reports, and they shall be produced.

FRBNY's agency records). However, it is inappropriate to assume without deciding that a FRB is an agency if the applicability of a FOIA exemption necessarily depends on a determination of that question. *See, e.g.*, n. 12, *infra*.

(i) FOIA Exemption 4

For Exemption 4 to apply, the withheld record must (1) contain information that is a "trade secret" or "commercial or financial" in character, (2) be "obtained from a person," and (3) be "privileged or confidential." 5 U.S.C. § 552(b)(4); *see also Inner City Press/Community on the Move v. Board of Governors of the Federal Reserve System*, 463 F.3d 239, 244 (2d Cir.2006). The parties here concede that the Remaining Term Reports qualify as commercial and financial in character. The parties disagree over whether the Remaining Term Reports were obtained from a person and whether they are privileged or confidential. The Remaining Term Reports do not satisfy either requirement.

(a) Exemption 4: Obtained from a "Person" Requirement

The Board contends that the FRBNY obtained the information contained in the Remaining Term Reports from the borrowers, who unquestionably qualify as "people" for FOIA purposes. (Board Br. at 16.)[12] The parties have not brought to the

[12] The Board also suggests that it obtained the information contained in the Remaining Term Reports from a person because the Board obtained the information from the FRBNY and the FRBNY qualifies as a person. (Board Br. at 16.) But the only way the FRBNY could qualify as a person is if this Court determined that the FRBNY does not qualify as an agency because FOIA defines "person" as an "individual, partnership, corporation, association, or public or private organization *other than an agency*." 5 U.S.C. § 551(2) (emphasis added). The Board has adamantly maintained throughout the course of this action that the question of whether the FRBNY is an agency is not relevant and need

Court's attention any standard, other than one based on plain language meaning, for determining when information is obtained from a person. As such, applying the plain language meaning of obtain,[13] the Court disagrees with the Board's characterization of the information as "obtained from" the borrowers.

The only information in the Remaining Term Reports that the FRBNY and other FRBs could possibly have obtained from the borrows is the borrowers' names; the FRBs generated all the other information from internal data regarding their lending programs. It is evident from the Board's own testimony that the bulk of the information contained in the Remaining Term Reports was generated by the FRBNY and other FRBs operating DW programs. When borrowers applied to the FRBs for loans, the borrowers provided certain financial information including, *inter alia*, identification information, pledged collateral, and requested loan amounts. However, none of this information is contained in the Remaining Term Reports, other than borrower names. Rather, the Remaining Term Reports describe the originating

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not be decided. (Board Reply Br. at 9; Board Supp. Br. at 1.) Thus, in light of this inconsistency, the Court cannot help but conclude that the Board intended to abandon its argument that it obtained the information contained in the Remaining Term Reports from a person because it obtained the information from the FRBNY.

[13] *See* Oxford English Dictionary (2009) ("To come into the possession of; to procure; to get, acquire, or secure."); Webster's Third New International Dictionary Unabridged (2009) ("[T]o gain or attain possession or disposal of usually by some planned action or method.").

FRB districts of the loans, individual loan amounts extended by the FRBs, the types of FRB lending program borrowed from, and loan origination and maturity dates. (Thro Decl. ¶¶ 11, 13; Board's Local Rule 56.1 Stmt. ¶ 5.) The FRBNY and FRBs generated this information from statistics they kept concerning the DW, TAF, PDCF and TSLF lending programs. For DW loans, "Reserve Bank staff would review the request, verify collateral and, if approved, enter the loan in the Reserve Bank's loan and accounting systems." (*See* Decl. of Brian F. Madigan ¶ 11.) For PDCF and TSLF loans, the Board determined the maximum amount of funds to be provided, and the FRBNY then administered auction mechanisms to determine the actual loan amounts and terms. (*See id.* ¶ 8, 10.)

The fact that the FRBs themselves generated the information contained in the Remaining Term Reports is sufficient to vitiate the applicability of Exemption 4 with respect to that information. *Cf. Buffalo Evening News, Inc. v. Small Bus. Admin.*, 666 F.Supp. 467, 469 (W.D.N.Y.1987) ("I find that all of the information sought by plaintiff here has been generated by the defendant SBA in the course of its involvement with its borrowers. . . . [T]his information in no way implicates any of the financial information provided by the borrowers to the government.").[14] The information in the

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[14] The Board incorrectly characterizes the holding of *Buffalo Evening News* as dependant on the fact that the SBA borrowers' names were publicly available prior to the FOIA request in that action. (Board Reply Br. at 15.) *Buffalo Evening News* states clearly that the agency's act of generating information was the motivating factor in the decision;

Remaining Term Reports relates more to the FRBNY's decisions to lend than to the information provided by the borrowers. While the Remaining Term Reports certainly include information about the FRBs' interactions with the borrowers, it is a *non sequitur* to say that information *about* a person is obtained *from* that person.

The Board has not met its burden of showing that the information, other than the borrowers' names, in the Remaining Term Reports was obtained from a person and, indeed, has raised no material issue of fact. But, as explained below, the information constituting borrowers' names—and, for that matter, *all* the information contained in the Remaining Term Reports—is not confidential, and thus falls outside the scope of Exemption 4.

(b) Exemption 4: "Privileged or Confidential" requirement

As to the third Exemption 4 requirement, the Board contends that the information contained in the Remaining Term Reports is confidential. (Board Br. at 18-23.) Bloomberg contends that it is not. (Bloomberg Br. at 21-35.) In *Continental Stock Transfer & Trust Co. v. S.E.C.*, 566 F.2d 373, 375 (2d Cir.1977), the Court of Appeals adopted a two-part test, formulated by the District of Columbia Court of Appeals, in *National Parks & Conservation Association v. Morton*, 498 F.2d

it does not discuss the significance of the fact that the names were publicly available. 666 F.Supp. at 469. In any event, the Board does not explain how the availability of information in the public domain has any bearing on whether an agency obtained that information from a person. The two concepts are not mutually exclusive.

765 (D.C.Cir.1974), for determining whether information is confidential for purposes of Exemption 4. "The test states that information is confidential for the purposes of Exemption 4 if its disclosure would have the effect either: '(1) of impairing the government's ability to obtain information necessary information—in the future, or (2) of causing substantial harm to the competitive position of the person from whom the information was obtained.' " *Inner City Press*, 463 F.3d at 244 (quoting *Cont'l Stock*, 566 F.2d at 375). The Board has not argued that disclosure of the Reports will affect its ability to obtain necessary information in the future. (*See* Board Br. at 15-30.) Instead, the Board contends that disclosure will cause substantial harm to the competitive position of Federal Reserve System borrowers. Accordingly, only that part of the test will be considered.[15]

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[15] Some courts have recognized a third governmental interest that may qualify information as confidential for purposes of Exemption 4, referred to as the "program effectiveness" test, and the Board urges this Court to apply it in this action. (*See* Board Br. at 17, 23-30.) The program effectiveness test is derived from a footnote in *National Parks* that "express[ed] no opinion as to whether other governmental interests are embodied in [Exemption 4]," such as "program effectiveness." *See National Parks*, 498 F.2d at 770 n. 17. In adopting the *National Parks* formulation of Exemption 4, the Court of Appeals has explicitly stated that its "adoption did not encompass the speculation regarding 'program effectiveness' in footnote 17 of *National Parks*." *Nadler v. F.D.I.C.*, 92 F.3d 93, 96 & n. 2 (2d Cir.1996). Nevertheless, at least one district court in this Circuit has imported the program effectiveness test. *See, e.g., Fox News Network, LLC v. Board of Governors of The Federal Reserve System*, 639 F.Supp.2d 384, 400-402 (S.D.N.Y. July 30, 2009). *See*

Because the Court of Appeals has imported the *National Parks* confidentiality test from the D.C. Circuit, consulting the D.C. Circuit's burden standard in this regard is appropriate. An agency must point to specific evidence substantiating an assertion that release of a record would cause substantial competitive harm to the person from whom the information was obtained. *See Public Citizen Health Research Group v. F.D.A.*, 704 F.2d 1280, 1291 (D.C.Cir.1983) ("Conclusory and generalized allegations of substantial competitive harm, of course, are unacceptable and cannot support an agency's decision to withhold requested documents."). The agency must provide evidence that if the requested information is disclosed, competitive harm would be "imminent." *Iglesias v. C.I.A.*, 525 F.Supp. 547, 559 (D.D.C.1981). And the specific evidence must show that the competitive harm will result from the affirmative use of the information by competitors of the person from whom the information was obtained, not merely injuries to that person's competitive position in the marketplace or "embarrassing publicity attendant upon public revelations." *Public Citizen*, 704 F.2d at 1291 n. 30.

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also Critical Mass Energy Project v. Nuclear Regulatory Comm'n, 975 F.2d 871, 879 (D.C.Cir.1992); *9 to 5 Org. for Women Office Workers v. Board of Governors of the Federal Reserve System*, 721 F.2d 1, 10 (1st Cir.1983).

In light of the strong presumption in favor of interpreting FOIA exemptions *narrowly*, not to mention the Court of Appeals's guidance that the program effectiveness test constitutes "speculation," *Nadler*, 92 F.3d at 96 n. 2, this Court will not import or apply the program effectiveness test in this action.

The Board has not met its burden of proving that disclosure of the information contained in the Remaining Term Reports will cause substantial harm to the competitive position of the borrowers and has failed to raise an issue of fact. The Board submits affidavits from Board employees describing how borrowers may be stigmatized if their utilization of the Federal Reserve lending programs is disclosed. For example, Brian F. Madigan, Director of the MA and an economist, posits that,

> I have observed that depository institutions that may potentially borrow at the DW recognize that their customers, lenders and other counterparties, market analysts, and news media organizations, among others, may draw adverse inferences from their decision to borrow from the Federal Reserve Banks. This stigma . . . can quickly place an institution *in a weakened condition vis-a-vis its competitors* by causing a loss of public confidence in the institution, a sudden outflow of deposits (a "run"), a loss of confidence by market analysts, a drop in the institution's stock price, and a withdrawal of market sources of liquidity.

(Decl. of Brian F. Madigan ¶ 17 (emphasis added); *see also* Decl. of Susan E. McLaughlin ¶¶ 20-22 ("If the name of an institution that borrowed from the [DW] were to be made public, there is a real concern that market participants, including financial analysts, customers, and competitors of the borrowing institution, would draw adverse conclusions about the borrowing depository institution that were based on conjecture and speculation.").)

These affidavits are insufficient to carry the Board's burden of showing that disclosure of the Remaining Term Reports will cause the borrowers to suffer imminent competitive harm from the affirmative use of the disclosed information *by their competitors* or to raise an issue of fact on this question. In fact, they say *nothing* about how borrowers' competitors will affirmatively use the information that the borrowers participated in the Federal Reserve lending programs. At best, the proffered affidavits suggest that the borrowers' competitors may use the knowledge that a borrower participated in a Federal Reserve lending program in order to determine when the borrower is "in a weakened condition" and spread that information to the borrowers' shareholders or the market in general. But the risk of looking weak to competitors and shareholders is an inherent risk of market participation; information tending to increase that risk does not make the information privileged or confidential under Exempt ion 4. The Board would seemingly sweep within the scope of Exemption 4 all information about borrowers that anyone throughout the entire marketplace might consider to be *negative*. The Exemption cannot withstand such inflation.[16]

Nor does the Board point to an immediate risk of competitive harm that will result from disclo-

[16] Additionally, the Court finds that the Board's implied "understanding" with borrowers that certain information will remain secret constitutes insufficient evidence to show that the borrowers will suffer competitive harm. An agency's promise that information will remain confidential certainly does not, *ipse dixit*, make it so for purposes of Exemption 4.

sure of the Remaining Term Reports. The Board essentially speculates on how a borrower *might* enter a downward spiral of financial instability if its participation in the Federal Reserve lending programs were to be disclosed. (*See, e.g.*, Decl. of Brian F. Madigan ¶ 20 (the borrower "could be forced to pay very high rates to borrow and might be limited in its ability to issue longer-term debt").) Conjecture, without evidence of imminent harm, simply fails to meet the Board's burden of showing that Exemption 4 applies. Accordingly, I find that the Board improperly invoked Exemption 4 with respect to all the information in the Remaining Term Reports.

(ii) FOIA Exemption 5

Exemption 5 protects "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). The Board contends that "there can be little doubt that the Remaining Term Reports are 'inter-agency or intra-agency memorandums or letters,' under 5 U.S.C. § 552(b)(5) as they are prepared by Board staff using data supplied by the [FRBs] and distributed to Board staff (with copies to the FRBNY) for use in formulating monetary policy and for Reserve Bank supervision purposes." (Board Br. at 32.) In light of this statement, the Board's position with respect to the status of the FRBs is unclear. The Board's position in this context impliedly concedes that the FRBs are agencies, thus satisfying the inter-agency memorandums requirement of Exemption 5, but the Board has also maintained throughout

the course of this action that the issue of whether the FRBs are agencies is irrelevant (and in supplemental briefing requested by the Court, the Board has even argued that the FRBs are *not* agencies). In the end, resolution of this quandary is not necessary to determine the applicability of Exemption 5 to the Remaining Term Reports because Bloomberg does not dispute that the Remaining Term Reports qualify as inter-agency or intra-agency memorandums. (Bloomberg Br. at 38-39; Bloomberg Reply Br. at 8.)

The parties disagree primarily over whether the Remaining Term Reports would or would not "be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). The Supreme Court has interpreted this requirement to mean that Exemption 5 "simply incorporates civil discovery privileges." *United States v. Weber Aircraft Corp.*, 465 U.S. 792, 799, 104 S.Ct. 1488, 79 L.Ed.2d 814 (1984) (recognizing incorporation of the so-called " *Machin* [*v. Zuckert*, 316 F.2d 336 (D.C.Cir.1963)] privilege"); *see also F.T.C. v. Grolier, Inc.*, 462 U.S. 19, 26-27, 103 S.Ct. 2209, 76 L.Ed.2d 387 (1983) (recognizing incorporation of the work product privilege); *Fed. Open Mkt. Comm. of the Fed. Reserve Sys. v. Merrill*, 443 U.S. 340, 354, 99 S.Ct. 2800, 61 L.Ed.2d 587 (1979) (recognizing incorporation of a quasi-confidential commercial information privilege); *N.L.R.B. v. Sears, Roebuck & Co.*, 421 U.S. 132, 152-154, 95 S.Ct. 1504, 44 L.Ed.2d 29 (1975) (recognizing incorporation of the pre-decisional deliberative process privilege and attorney work product privilege).

The Board contends that the Remaining Term Reports would be privileged in civil discovery under the privilege recognized in *Merrill*. The Board contends that Merrill recognized "a privilege analogous to the qualified privilege for confidential commercial information available in civil discovery under Fed.R.Civ.P. 26(c)(7)." (Board Br. at 31.) The Board's reading of *Merrill* in this regard is correct; *Merrill* indeed adapted a privilege from the then-extant Federal Rule Civil Procedure 26(c)(7). However, seizing on *Merrill*'s dicta, the Board also suggests that Exemption 5 protects "'sensitive information not otherwise available . . . immediate release of [which] . . . would significantly harm the Government's monetary functions or commercial interests . . . .'" (Board Reply Br. at 23 (quoting *Merrill*, 443 U.S. at 363, 99 S.Ct. 2800); *see also* Board Br. at 31, 33.) The Board is mistaken; *Merrill*'s holding was not so broad.

Merrill considered whether FOIA Exemption 5 allowed the FOMC to withhold Domestic Policy Directives, monthly statements of policy from the FOMC to a senior account manager at the FRBNY indicating the FOMC's tolerance ranges for growth in the money supply and the federal funds rate. 443 U.S. at 344-45, 99 S.Ct. 2800. The *Merrill* Court "conclude[d] that Exemption 5 incorporates a qualified privilege for confidential commercial information, at least to the extent that this information is generated by the Government itself in the process leading up to awarding a contract." *Id.* at 360, 99 S.Ct. 2800. The Supreme Court then determined, by way of a concededly *inexact analogy*, that the FOMC Domestic Policy

Directives may well fall within the scope of Exemption 5 because they were similar to confidential commercial information generated by the Government in the process leading up to awarding a contract. *Id.* at 361, 99 S.Ct. 2800. Ultimately, however, the Court left the determination of whether the FOMC Domestic Policy Directives actually fell within the scope of Exemption 4 for the district court. *Id.* at 364, 99 S.Ct. 2800.

The *Merrill* Court certainly did not intend to create a sweeping new privilege for any sensitive information, the immediate release of which would significantly harm the Government's monetary functions or commercial interests. *Merrill* does not support such a reading, and that purported privilege is not incorporated into Exemption 5. *See id.* at 362, 99 S.Ct. 2800 (" '[T]here is no absolute privilege for trade secrets and similar confidential information.' ") (quoting 8 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2043 (1970)). Other Courts have recognized the limited nature of *Merrill* 's holding. *See, e.g., Shermco Indus., Inc. v. Sec'y of the Air Force*, 613 F.2d 1314, 1319 n. 11 (5th Cir.1980); *Anderson v. Dep't of Health and Human Servs.*, 907 F.2d 936, 945-946 (10th Cir.1990).

Nor would analogizing the Remaining Term Reports to confidential commercial information generated by the Government in the process leading up to awarding a contract be fruitful for the Board in this action. The Remaining Term Reports consist of aggregate information about participants in the FRBs' lending programs. And while the Remaining Term Reports were circulated to Board and FRBNY staff, the Reports do not con-

tain any information remotely similar to the type of information discussed in *Merrill*: information that provides guidance or directives. Instead, they provide historic data.

Accordingly, the Board has not met its burden of showing that the Remaining Term Reports would not be available by law to a party other than an agency in litigation with the agency. As such, Exemption 5 does not permit the Board to withhold the Remaining Term Reports.[17]

III. *CONCLUSION*

For the reasons set forth herein, the Board's Motion for Summary Judgment [dkt. no. 10] is DENIED, and Bloomberg's Motion for Summary Judgment [dkt. no. 18] is GRANTED. Specifically,

> 1. The Board shall produce forthwith the Remaining Term Reports within five business days of the date hereof;
>
> 2. The Board shall search forthwith records at the FRBNY that constitute "Records of the Board" within the meaning of 12 C.F.R. § 261.2(i)(1); and
>
> 3. The parties shall confer following their review of the results of the search and inform the Court by letter no later than September 14, 2009 how they propose to proceed.

SO ORDERED.

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[17] Finally, the Board cites no authority from this Circuit supporting its theory that Exemption 5 "protects the government when it enters the marketplace as an ordinary buyer or seller." (Board Br. at 32 (internal quotation marks omitted).) Accordingly, that theory is rejected.

5 U.S.C. § 552(b)

(b) This section does not apply to matters that are—

(1) (A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;

(2) related solely to the internal personnel rules and practices of an agency;

(3) specifically exempted from disclosure by statute (other than section 552b of this title), if that statute—

(A)(i) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue; or

(ii) establishes particular criteria for withholding or refers to particular types of matters to be withheld; and

(B) if enacted after the date of enactment of the OPEN FOIA Act of 2009, specifically cites to this paragraph.

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

(6) personnel and medical files and similar files the disclosure of which would constitute

a clearly unwarranted invasion of personal privacy;

(7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source, (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or (F) could reasonably be expected to endanger the life or physical safety of any individual;

(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency respon-

sible for the regulation or supervision of financial institutions; or

(9) geological and geophysical information and data, including maps, concerning wells.

Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection. The amount of information deleted, and the exemption under which the deletion is made, shall be indicated on the released portion of the record, unless including that indication would harm an interest protected by the exemption in this subsection under which the deletion is made. If technically feasible, the amount of the information deleted, and the exemption under which the deletion is made, shall be indicated at the place in the record where such deletion is made.

No. 10-543

IN THE

Supreme Court of the United States

THE CLEARING HOUSE ASSOCIATION L.L.C.,

Petitioner,

v.

BLOOMBERG L.P. and THE BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM,

Respondents.

On Petition For A Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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February 18, 2011

PROCEDURAL POSTURE AND COUNTERSTATEMENT OF QUESTIONS PRESENTED FOR REVIEW

On May 20, 2008, Bloomberg L.P. ("Bloomberg") submitted a Freedom of Information Act ("FOIA") request to the Board of Governors of the Federal Reserve System (the "Board") seeking documents concerning certain lending activities by Federal Reserve Banks ("FRBs" and, together with the Board, the "Fed"). On November 7, 2008, after having received no formal response from the Board despite repeated requests for one, Bloomberg commenced an action in the United States District Court for the Southern District of New York, seeking an order compelling the Board to produce the requested documents. On August 24, 2009, the District Court entered an order requiring the Board to disclose its responsive documents. Following entry of that order, The Clearing House Association L.L.C. (the "Clearing House") intervened in the action and, with the Board, appealed the District Court's judgment. On March 19, 2010, the Second Circuit affirmed that judgment. By order dated August 27, 2010, the Second Circuit denied the Clearing House's petitions for panel and *en banc* rehearing. The Second Circuit stayed its order pending the filing of a petition for writ of certiorari. The Clearing House filed its petition on October 26, 2010.

The questions raised by the Clearing House's petition are:

1. Whether the parties' dispute has effectively been mooted by Congress's enactment of the Dodd-Frank Wall Street Reform and Consumer

Protection Act, pursuant to which much of the information in question has now been disclosed, and which has set specific rules regarding the disclosure of future Fed lending?

2. Whether the Second Circuit correctly applied well-established law to the particular facts of this case in holding that FOIA's Exemption 4, which applies only to information "obtained from a [non-agency] person," does not apply to the agency records in question because the information they contain was not "obtained from a person" but instead is information generated by a federal agency regarding governmental action?

3. Whether the Second Circuit correctly held that Exemption 4 does not include a so-called "program effectiveness" test, consistent with the text of FOIA (which contains no such provision) and Supreme Court precedent (which held that Exemption 5 of FOIA should not be read to encompass a "program effectiveness" test)?

RULE 29.6 DISCLOSURE STATEMENT

Respondent Bloomberg, the owner and operator of Bloomberg News, is a limited partnership organized under the laws of the State of Delaware. Bloomberg's partnership interests are held by Bloomberg, Inc. and BLP Acquisition L.P., neither of which is a publicly-held entity. No publicly-held entity owns any of Bloomberg's partnership interests.

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IN THE

Supreme Court of the United States

THE CLEARING HOUSE ASSOCIATION L.L.C.,
Petitioner

—v.—

BLOOMBERG L.P. and THE BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondent Bloomberg L.P. ("Bloomberg") respectfully submits this brief in opposition to the petition of The Clearing House Association L.L.C. (the "Clearing House") for a writ of certiorari to review the March 19, 2010 unanimous judgment of the United States Court of Appeals for the Second Circuit.

PRELIMINARY STATEMENT

The petition marks the continuation of an almost three-year campaign – commenced by the Board and assumed by the Clearing House – to nullify the Board's disclosure obligations under the Freedom of Information Act and cloak in secrecy the Fed's unprecedented and highly controversial use of public money to prop up financial institutions during

the 2008 financial crisis. The Clearing House has consistently based that campaign on the assertion that disclosure would cause competitive harm to the borrowers by "stigmatizing" them. But that assertion is legally insufficient, factually unsupported, and disproven by the response to the recent, Congressionally-mandated disclosure of much of the information in question.

That disclosure, which the 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act compelled the Board to make, did not produce any of the calamities that the Clearing House maintained would inevitably result from Fed transparency. It has therefore not only disproven the central premise of the Clearing House's petition, but has also effectively mooted much of the parties' dispute, as the Clearing House concedes. (Petition at 3 n.2.)[1]

Indeed, the Clearing House's arguments about the need for guidance from the Court are directed less at the instant dispute, and more at imagined, future FOIA requests to other agencies. Of course, the Court's role is to decide live cases and controversies between the litigants before it, not to issue advisory opinions to help guide other agencies' handling of speculative and imaginary future FOIA requests. And no such guidance is needed with respect to requests for records of future Fed lending under the programs at issue here, because the Dodd-Frank Act, which mandates disclosure of such records on specific schedules, has answered that question, too.

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[1] All citations to "Petition" are to the Clearing House's petition for a writ of certiorari, dated October 26, 2010.

The fact that Dodd-Frank mandates future disclosures regarding the Fed's emergency lending programs also belies the Clearing House's claim that the Second Circuit's decision, if not reversed, will diminish the effectiveness of those programs. That argument is based on the notion that future borrowers, no matter how dire their straits, will not avail themselves of Fed assistance for fear of being stigmatized if the fact of their borrowing became public, thereby diminishing the Fed's ability to affect monetary policy. But to the extent future borrowers will make decisions based on publicity concerns rather than liquidity needs, they will look to the clear and dispositive disclosure rules contained in the Dodd-Frank Act, not the outcome of this litigation. Perhaps in recognition of that, the Solicitor General – who represents the governmental interests that the Clearing House invokes – declined the Board's request for permission to seek certiorari (Petition at 19-20) and has not supported the Clearing House's petition.

The Board and the Clearing House succeeded in delaying disclosure of the requested information for over two years, notwithstanding the unambiguous rulings of the District Court and Court of Appeals, and capitulated only when Congress intervened. They continue to block disclosure of the remaining information, even 34 months after the lending activities in question took place. That delay flies in the face of FOIA's command that non-exempt documents be disclosed to taxpayers in a timely fashion, and has severely undermined the public confidence in government that FOIA's broad disclosure requirements were designed to engender. Bloomberg respectfully submits that disclosure of the

agency records in question has been delayed long enough, and that the Clearing House cannot show any "compelling reasons" for further delay. Accordingly, Bloomberg respectfully requests that the Clearing House's petition be denied.

COUNTERSTATEMENT OF THE CASE

A. The Fed's Mandate and the Loan Programs at Issue.

The Board oversees the government's central banking system, and its objectives include "to promote effectively the goals of maximum employment, stable prices, and moderate long-term interest rates"; to address "unusual exigent circumstances" in the domestic economy; and to relieve liquidity strains through lending. (Board Appeal Br. at 4-5, 32-33.)

The Board accomplishes these objectives in large part through loan programs administered by the various FRBs, including the lending facilities ("Lending Facilities") at issue here. Those facilities include the Discount Window ("DW"), the Term Auction Facility ("TAF"), the Primary Dealer Credit Facility ("PDCF") and the Term Securities Lending Facility ("TSLF"). Through these Lending Facilities, the Fed lends taxpayers' money to certain private institutions for short periods of time, ranging from overnight to 90 days. (JA-265-298.)[2]

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[2] All citations to "JA" are to the Joint Appendix submitted before the Second Circuit.

During 2008, according to the Fed's public reports, the institutions eligible to participate in the Lending Facilities included Banc of America Securities LLC, Barclays Capital Inc., Goldman, Sachs & Co., HSBC Securities (USA) Inc., J.P. Morgan Securities Inc., Merrill Lynch Government Securities Inc., Morgan Stanley & Co. Inc., Bear, Stearns & Co., and Lehman Brothers Inc. (JA-313.) During the week of August 9, 2007, before the Fed expanded its loan programs during the economic crisis, the Fed had an average outstanding loan balance through the discount window of approximately $1 million. (JA-350.) During the week of October 8, 2008, after changes to the Fed's loan programs, the Fed had an average outstanding loan balance of over $400 billion. (JA-270-77.)

The Board creates records called "Remaining Term Reports" to summarize FRB lending activities through the Lending Facilities. (JA-38-39, at ¶ 11.) For each loan, the Remaining Term Reports contain the name of the borrower institution, the type of institution, the originating FRB, the type of credit extended, the origination and maturity dates of the loans, the individual loan amounts, the total credit outstanding, and the total credit maturing on a specific date. (JA-57.) The Board creates those records based on data it receives from the FRBs. (*Id.*)

B. Bloomberg's FOIA Request and the Board's Withholding of Responsive Remaining Term Reports.

On May 20, 2008, Bloomberg submitted to the Board a request (the "Request") under the Freedom

of Information Act ("FOIA"), 5 U.S.C. § 552, seeking information concerning the Lending Facilities. (JA-14-15.) Not until December 9, 2008 – almost seven months after Bloomberg submitted the Request (and after Bloomberg filed suit) – did the Board formally respond to it. In its response, the Board informed Bloomberg that it had located 231 responsive Remaining Term Reports, but claimed that they were exempt from disclosure under FOIA's Exemption 4 (which allows an agency to withhold confidential commercial information obtained from a non-agency "person") and Exemption 5 (which covers certain materials sent within or between agencies). (JA-60-64.)

C. The Proceedings Below

1. Bloomberg Sues for Disclosure, and the Parties Move Directly to Summary Judgment.

On November 7, 2008 (prior to receiving the Board's belated response to its FOIA request), Bloomberg sued the Board, seeking to compel disclosure of responsive records. (JA-2, Docket Sheet Entry #1; JA-9-22.) On March 4, 2009, the Board moved for summary judgment on a number of grounds. (JA-3-4, Docket Sheet Entries #9-17.) Bloomberg opposed the Board's motion and filed its own motion for summary judgment seeking immediate disclosure of the requested records. (JA-4, Docket Sheet Entries #18-24.) The Board opposed Bloomberg's motion but did not claim the need for any discovery.

2. The District Court Rules That the Remaining Term Reports Are Not Exempt From Disclosure.

On August 24, 2009, the District Court granted Bloomberg's summary judgment motion. *Bloomberg L.P. v. Bd. of Governors*, 649 F. Supp. 2d 262 (S.D.N.Y. 2009). Among other things, the District Court concluded that the Board failed to meet its burden of proving that the Remaining Term Reports were covered by Exemption 4. In reaching that conclusion, the District Court found that the Board did not "point to an immediate risk of competitive harm that will result from disclosure of the Remaining Term Reports." *Id.* at 280. The District Court explained that "[c]onjecture, without evidence of imminent harm, simply fails to meet the Board's burden of showing Exemption 4 applies." *Id.* The District Court also declined to join those courts that expanded Exemption 4 to include a so-called "program effectiveness" test, which would allow an agency to withhold documents if it thought disclosure would diminish the effectiveness of its programs. *Id.* at 278 n.15. Finally, the District Court held that Exemption 4 did not apply because most of the information in the Remaining Term Reports was not obtained from a non-governmental "person." *Id.* at 278. The District Court ordered the Board to produce the Remaining Term Reports within five business days. *Id.* at 282. It then stayed its order to give the Board time to file a notice of appeal. (JA-6, Docket Sheet Entry #33.)

On September 17, 2009, two weeks after judgment was entered, the District Court granted the Clearing House leave to intervene. (JA-513.)

3. The Second Circuit Affirms the District Court's Judgment.

The Board and the Clearing House appealed the District Court's judgment to the Second Circuit. (JA-521-522.) On appeal they maintained that Exemption 4 covers the requested material, but abandoned any argument under Exemption 5. On March 19, 2010, the Second Circuit issued a unanimous decision affirming the judgment of the District Court. *Bloomberg L.P. v. Bd. of Governors*, 601 F.3d 143 (2d Cir. 2010). Applying well-settled case law, the Second Circuit held that the information in the Remaining Term Reports – including the identity of the borrowing banks, the dollar amount of the loans, the loan origination and maturity dates, and the collateral securing the loans – was not "obtained from" the borrowing banks within the meaning of Exemption 4 because that information was generated by the Board and reflects governmental action. *Id.* at 148-49. The Second Circuit also held that disclosure of the requested materials would not cause the FRBs – from whom the Board obtained the information – to suffer the kind of competitive harm contemplated by the "privileged or confidential" requirement of Exemption 4. *Id.* at 149-51. In so holding, the Second Circuit expressly rejected the Board and the Clearing House's request that it extend the reach of Exemption 4 beyond its plain terms to encompass the so-called "program effectiveness" test. *Id.* at 150-51.

On May 3, 2010, the Board and the Clearing House filed petitions for panel and *en banc* rehearing. On August 20, 2010, the Second Circuit denied those petitions. The Board and the Clearing

House then moved to stay the Second Circuit's mandate. By orders dated August 27, 2010, the Second Circuit stayed its mandate for 60 days.

On October 26, 2010, the Clearing House filed its petition for a writ of certiorari. The Board did not file a certiorari petition. The Clearing House's petition revealed that on October 22, 2010, the Board informed the Clearing House that the Solicitor General had denied the Board's request to file a certiorari petition. (Petition at 19-20.)

By letter dated November 9, 2010, the Solicitor General requested, pursuant to Supreme Court Rule 30.4, a one month extension of the thirty-day period (*see* SUP. CT. R. 15) to file the government's response to the petition. The Solicitor General followed that request with two additional ones. Those requests reveal the Solicitor General's decision not to support the Clearing House's petition. *See* SUP. CT. R. 12.6 (stating that a respondent who *supports* a petition is allowed to file a response to the petition setting forth its support, but must do so within twenty days after the case is placed on the Court's docket, a period of time which "will not be extended").

Thus, the Clearing House seeks certiorari without the government's support.

D. The Board Discloses Much of the Information in Question Pursuant to the Dodd-Frank Act.

On July 21, 2010, President Obama signed into law the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act" or the "Act"), Pub. L. No. 111-203, 124 Stat. 1376

(2010). The Dodd-Frank Act addressed the issues in this case in two important ways: it mandated the disclosure of much (but not all) of the information Bloomberg sought in its FOIA request, and it established specific requirements for the disclosure of the Board's post-Act lending activities.

In particular, Section 1109 of the Dodd-Frank Act required the Board to disclose, by December 1, 2010, for all parties that received assistance under the TAF, the TSLF, and the PDCF (among other emergency lending facilities): (1) the identity of the borrower; (2) the type of assistance provided; (3) the value of the assistance; (4) the date on which the assistance was provided; and (5) the terms of repayment, including interest and collateral. Dodd-Frank Act § 1109(c). That is precisely the information that Bloomberg requested in its FOIA request with respect to those programs.

Consistent with the requirements of the Dodd-Frank Act, on December 1, 2010, the Board published detailed reports listing, with respect to the TAF, TSLF, and PDCF programs, the name of each borrower, the amount borrowed, the terms of the transaction, and the type of collateral posted. As was widely reported by several major news organizations, the spreadsheets showed that the loans were received by many prominent financial institutions whose interests are being represented here by the Clearing House. As the Clearing House concedes, any appeal with respect to information relating to those three emergency lending programs is therefore moot. (*See* Petition at 3 n.2.) And, contrary to the speculation at the heart of the Board's petition, the

disclosure of this information had no apparent adverse effect on any borrower.[3]

The Dodd-Frank Act also mandates disclosure of the Fed's future lending activities, including DW lending. With respect to DW lending, on the last day of the eighth calendar quarter following the quarter in which the transaction was conducted (*i.e.*, two years after the transaction is conducted), the Board must disclose: (1) the name and identifying details of each borrower; (2) the amount borrowed; (3) the interest rate or discount paid; and (4) information identifying the types and amounts of collateral. *See* Dodd-Frank Act § 1103(b); 12 U.S.C. § 248(s) (as amended). The same information must be disclosed with respect to lending through emergency facilities one year after the Board terminates such a facility. *Id.* The Chairman of the Board is authorized to disclose such information earlier upon a determination "that such disclosure would be in the public interest and would not harm the effectiveness of the relevant credit facility or the purpose or conduct of covered transactions." *Id.*

These rules reflect the Congress's policy determination regarding the proper balance between the impact that immediate disclosure might have on the effectiveness of the various Lending Facilities,

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[3] The stock price of many of the borrowing banks *increased* significantly on December 1, as the Dow Jones Industrial Average rose more than 2.25 percent on that day alone. John Spence, *Bank Stocks Join in Market Rally*, MarketWatch (Dec. 1, 2010, 5:37 PM), http://www.marketwatch.com/story/data-lift-banks-as-europe-debt-fears-recede-2010-12-01.

and the public's right to know how its money is being spent. In particular, it reflects the Congress's definitive conclusion that, with the passage of two years' time, the public interest in disclosure outweighs any competing interest in secrecy.

REASONS FOR DENYING THE PETITION

There is no "compelling reason" for the Court's intervention here. Indeed, there are at least four compelling reasons for the Court to *deny* the Clearing House's petition: *First*, the disputed issues here have been largely mooted by Congressional action. *Second*, in affirming the District Court, the Second Circuit followed well-established FOIA law in declining to apply Exemption 4 here – it did not, as the Clearing House asserts, create a new exception to that exemption. *Third*, the Second Circuit's rejection of a so-called "program effectiveness" test does not warrant review, despite the supposed "split" with the First and D.C. Circuits on that point, where (a) this Court has already considered and rejected any such exemption in an analogous context, (b) the Executive Branch – whose interests are ostensibly protected by the "program effectiveness" exemption – has not asked the Court to review the matter, (c) it is up to the Congress, not the courts, to adopt such an exemption, (d) the Congress has now spoken with respect to the information requested by Bloomberg, and (e) the "split" among the Circuits is not ripe for the Court's review. *Fourth*, further delays would be inconsistent with FOIA's command that non-exempt documents be disclosed promptly.

I. THE UNDERLYING DISPUTE IS EFFECTIVELY MOOT.

As an initial matter, the Court should deny the Clearing House's petition because the dispute over disclosure of the information requested by Bloomberg is effectively moot. As a result of the Congress's enactment of the Dodd-Frank Act, the Board was *required* to – and, in fact, did – disclose most of the information in question on December 1, 2010. Thus, there is no longer a dispute with respect to that information. Moreover, the Dodd-Frank Act supplies the rules for disclosure of similar information on a going-forward basis. Thus, review by this Court will not impact future FOIA requests for the types of information at issue here. Because the dispute over disclosure of the information requested by Bloomberg is now effectively moot, there is no "compelling reason" to review the Second Circuit's decision.[4]

A. Dodd-Frank Has Resulted in Disclosure of Much of the Information in Question.

Bloomberg's FOIA request sought information relating to lending by the Fed pursuant to the DW, the TAF, the TSLF, and the PDCF. In particular, Bloomberg sought the identities of the borrowers, the amounts borrowed, and the collateral posted for

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[4] Dodd-Frank states that the Fed's disclosure obligations mandated by the Act are not meant to affect pending litigation. Dodd-Frank Act § 1103(b); 12 U.S.C. § 248(s)(9). However, that provision does not bolster the Clearing House's argument here. Indeed, the Clearing House's argument in support of the petition is focused on hypothetical future FOIA requests.

these Lending Facilities for the period April 4, 2008 through May 20, 2008. The Dodd-Frank Act has now resulted in the disclosure sought by Bloomberg with respect to TAF, TSLF, and PDCF lending (the "Non-DW Lending Facilities").

Section 1109 of Title XI of the Dodd-Frank Act required the Board to disclose by December 1, 2010, the following information concerning the Non-DW Lending Facilities: (1) the identity of the borrower; (2) the type of assistance provided; (3) the value of the assistance; (4) the date on which the assistance was provided; and (5) the terms of repayment including interest and collateral. That is precisely the information that Bloomberg sought in its FOIA request with respect to those programs. (JA-14-15.) On December 1, 2010, the Board complied with Dodd-Frank's mandate and released that information.

Thus, under the Dodd-Frank Act, regardless of whether the Second Circuit correctly affirmed the District Court's decision requiring disclosure of the requested information relating to each of the three Non-DW Lending Facilities, the Board has now published the information that Bloomberg requested about them. As a result, there can no longer be a dispute with respect to that information, as the Clearing House concedes in its petition. (*See* Petition at 3 n.2.)

B. Dodd-Frank Provides Clear Rules Governing Future FOIA Requests For the Type of Information at Issue Here, Including DW Lending Information.

While the Dodd-Frank Act did not compel disclosure of DW lending activities during the specific time period covered by Bloomberg's request, it does establish procedures for the disclosure of that type of information going forward. In particular, under the Dodd-Frank Act, the Board must disclose, with respect to future DW lending: (1) the name and identifying details of each borrower; (2) the amount borrowed; (3) the interest rate or discount paid; and (4) information identifying the types and amount of collateral. That information must be disclosed within two years after the transaction occurs.

Thus, although the specific DW lending information that Bloomberg requested is not implicated by this disclosure obligation, the Dodd-Frank Act has established the ground rules for disclosure of that same type of information regarding post-Act DW lending. Any decision here, therefore, will have limited precedential value, as it will only apply to FOIA requests to the Board for information on DW lending prior to the enactment of the Dodd-Frank Act. And a similar controversy is unlikely to arise regarding post-Act lending, because Congress has set forth clear rules for disclosure.

Because Congress' action and the December 1, 2010 disclosures by the Board have mooted much of the underlying dispute, there is no "compelling

reason" to review the Second Circuit's decision, and the petition should be denied. *See Preiser v. Newkirk*, 422 U.S. 395, 401 (1975) ("a federal court has neither the power to render advisory opinions nor to decide questions that cannot affect the rights of litigants in the case before them" and cannot provide "an opinion advising what the law would be upon a hypothetical state of facts") (internal quotations and citations omitted); *Padilla v. Hanft*, 547 U.S. 1062, 1062 (2006) (Kennedy, concurring) (petition for certiorari denied where petitioner's claims were "hypothetical and to no effect, at this stage of the proceedings" as a result of an intervening act by the government); *Aikens v. California*, 406 U.S. 813, 814 (1972) (dismissing previously granted writ of certiorari where intervening act of California Supreme Court rendered the issue moot).

II. THE SECOND CIRCUIT APPLIED WELL-SETTLED FOIA LAW IN FINDING THAT THE REQUESTED INFORMATION WAS NOT OBTAINED FROM THE BORROWERS.

The Clearing House invokes only one FOIA exemption here: Exemption 4, which protects "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4). For purposes of FOIA, "person" is defined as an "individual, partnership, corporation, association, or public or private organization *other than an agency*." 5 U.S.C. § 551(2) (emphasis added). In this case, the Second Circuit correctly held that Exemption 4 does not apply to the Remaining Term Reports because the information in them was not obtained from a

"person," but rather reflects governmental action. As the Second Circuit stated, "[t]he information requested by Bloomberg was generated within a Federal Reserve Bank upon its decision to grant a loan. Like the loan itself, it did not come into existence until a Federal Reserve Bank made the decision to approve the loan request." *Bloomberg*, 601 F.3d at 148.

Contrary to the Clearing House's argument, the Second Circuit did not create a new "executive action" exception to Exemption 4. Rather, the Second Circuit simply applied a properly-stated rule of law regarding "intertwined information" to the facts of this case. Its holding in that regard is entirely consistent with this Court's observation that because Exemption 4 is limited to information "obtained from a person," it does not cover "information generated by the Federal Government itself." *Fed. Open Mkt. Comm. v. Merrill*, 443 U.S. 340, 360 (1979); *see also Judicial Watch, Inc. v. FDA*, 449 F.3d 141, 148 (D.C. Cir. 2006) ("[M]aterials implicating Exemption 4 are generally not developed within the agency. Instead, it must procure commercial information from third parties, either by requirement or by request."); *Buffalo Evening News, Inc. v. Small Bus. Admin.*, 666 F. Supp. 467, 469 (W.D.N.Y. 1987) (ordering disclosure where a newspaper requested certain details about loans made by the Small Business Administration, rejecting the agency's argument that it "obtains information concerning the status of . . . [the] loan from the small business itself . . . . [and] merely compiles and records the data supplied by the business through its loan payment activity").

The cases cited by the Clearing House do not support a different conclusion. Rather, the information at issue in those cases consisted of compilations of data that were supplied to the government by private parties. *See Can. Commercial Corp. v. Dep't of the Air Force*, 514 F.3d 37 (D.C. Cir. 2008) (companies listed the item prices for goods in proposals and contracts with the government); *McDonnell Douglas Corp. v. NASA*, 180 F.3d 303, 304 (D.C. Cir. 1999) (aerospace company provided government agency with satellite launch pricing information, including "proposed prices for certain contract line items, including prices for several launch missions and various other launch-related services");[5] *Gen. Elec. Co. v. Dep't of the Air Force*, 648 F. Supp. 2d 95 (D.D.C. 2009) (companies listed the item prices for goods in proposals and contracts with the government);[6] *Pub. Citizen Health Research Grp. v. NIH*, 209 F. Supp. 2d 37 (D.D.C. 2002) (licensee provided government with royalty rates at the outset of negotiations with the government); *Judicial Watch, Inc. v. Export-Import Bank*, 108 F.

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5 The *McDonnell Douglas* court also held that although the line-item pricing figures provided to the agency by the company were protected from disclosure, it was "undisputed that the total price of the contract may be made public." 180 F.3d at 306. Disclosure of the "total contract price" there is identical to disclosure of the total loan amounts reflected in the Remaining Term Reports.

6 Moreover, the Clearing House's reliance on *Canadian Comm'l Corp.* and *General Electric* is misplaced because neither of those decisions discuss the "obtained from a person" requirement, the proposition for which the Clearing House cites them.

Supp. 2d 19 (D.D.C. 2000) (companies provided information in export insurance applications).[7] The reports in those cases are thus qualitatively different from the Remaining Term Reports, which reflect government action by the Fed in the form of details about FRB lending.[8]

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[7] The Clearing House's reliance on *Comstock International (U.S.A.), Inc. v. Export-Import Bank*, 464 F. Supp. 804 (D.D.C. 1979) is also misplaced. The Clearing House incorrectly asserts that, in connection with Exemption 4's "obtained from a person" requirement, the District Court for the District of Columbia concluded that the loan agreement at issue was protected from disclosure "even though 'the information contained in the loan agreement [was] not submitted to the government but rather generated by it through Eximbank's participation in the negotiation process.'" (Petition at 24 (quoting *Comstock*, 464 F. Supp. at 807).) However, that fact was relevant to the court's inquiry into whether there was a sufficient government interest threatened by disclosure, *not* whether the information in the loan agreement was "obtained from a person" within the meaning of Exemption 4. *See Comstock*, 464 F. Supp. at 806.

[8] Although the court in the unreported decision in *Clarke v. United States Department of Treasury*, Civ. A. No. 84-1873, 1986 WL 1234 (E.D. Pa. Jan. 28, 1986), held that the requested information was protected from disclosure by Exemption 4, the court's primary holding focused on the fact that the requested information did not exist in a previously prepared document. In any event, the *Clarke* court did not provide any discussion of the "obtained from a person" requirement, beyond the conclusory sentence that the information at issue there was obtained from a person, presumably because there was not a dispute between the parties concerning that prong of Exemption 4.

The Clearing House's argument amounts to, at most, an assertion that the Second Circuit erred in its factual determination that the information in the Remaining Term Reports did not come from borrowers. That complaint is ill-founded; the Second Circuit properly recognized that, as a factual matter, the borrowers requested loans from the FRBs, and the FRBs processed those loan requests. The FRBs then provided data concerning their lending activities, including the decisions to lend and the terms of the loans, to the Board, which used the information to create the Remaining Term Reports. Thus, the Remaining Term Reports reflect Fed (and, therefore, governmental) action. *Bloomberg*, 601 F.3d at 148. In any event, even if the Clearing House could demonstrate an error in that factual analysis, it does not and cannot demonstrate why any such factual error would warrant review by this Court.

Finally, the Clearing House expresses concern for how the Second Circuit's ruling might impact future FOIA requests to other agencies for other types of information. But this case does not involve any such request or any other agency. The Clearing House's speculation about future unrelated FOIA cases – and the supposed parade of horribles that the Clearing House speculates will occur as a result of the Second Circuit's decision – does not warrant review.

III. THE SECOND CIRCUIT'S REJECTION OF THE SO-CALLED "PROGRAM EFFECTIVENESS" TEST DOES NOT WARRANT REVIEW.

The Clearing House also contends that the Second Circuit's refusal to read a "program effectiveness" test into Exemption 4 has created a conflict with the D.C. and First Circuits that requires review by this Court. Bloomberg respectfully submits that the Second Circuit's rejection of a test that is nowhere to be found in the text of Exemption 4, and which was rejected by the Court in the context of Exemption 5, does not create a "compelling reason" warranting a grant of certiorari. Given that courts are commanded to construe FOIA's exemptions narrowly (*see, e.g., Dep't of Air Force v. Rose*, 425 U.S. 352, 360-61 (1976)), the creation of new exemptions must come from the Congress. Here, the Congress has spoken on the subject with the Dodd Frank Act, which explicitly balances the public's interest in disclosure with the Board's interest in maintaining the effectiveness of its emergency lending facilities.

The so-called "program effectiveness" test has its genesis in a footnote in *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974). The *National Parks* court cited to Congressional hearings in which "the problems of compliance and program effectiveness are mentioned as governmental interests possibly served by [Exemption 4]." *Id.* at 770 n.17. Subsequent to *National Parks*, the D.C. Circuit and the First Circuit adopted the "program effectiveness" test as a governmental interest that may render information

"confidential" under Exemption 4. *See 9 to 5 Org. for Women Office Workers v. Bd. Of Governors*, 721 F.2d 1, 11 (1st Cir. 1983); *see also Critical Mass Energy Project v. Nuclear Regulatory Comm'n*, 830 F.2d 278, 287 (D.C. Cir. 1987), *overruled on other grounds by Critical Mass Energy Project v. Nuclear Regulatory Comm'n*, 975 F.2d 871, 879 (D.C. Cir. 1992) (en banc).

However, this Court has already rejected a government agency's attempt to read the "program effectiveness" test into FOIA Exemption 5, which exempts from disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). *See also Merrill*, 443 U.S. at 354. In *Merrill*, the Court considered the Federal Open Market Committee (the "FOMC") of the Federal Reserve System's attempt to withhold "certain monetary policy directives from the public during the month they [were] in effect" because releasing them during that month supposedly "would undermine the effectiveness of the agency's policy." *Id.* at 343, 353.

The Court determined that the FOMC's assertion of the program effectiveness doctrine could not be reconciled with FOIA's fundamental goal of full disclosure. The Court reasoned:

> Such an interpretation of Exemption 5 would appear to allow an agency to withhold any memoranda, even those that contain final opinions and statements of policy, whenever the agency concluded that disclosure would

> not promote the "efficiency" of its operations or otherwise would not be in the "public interest." This would leave little, if anything, to FOIA's requirement of prompt disclosure, and would run counter to Congress' repeated rejection of any interpretation of the FOIA which would allow an agency to withhold information on the basis of some vague "public interest" standard.

Id. at 354.

As the Second Circuit noted below, that same conflict with FOIA's goals would arise if the "program effectiveness" test was read into Exemption 4. As the Second Circuit held, "[t]he 'program effectiveness' test, if applied as the Board invokes it, would give impermissible deference to the agency, and would be analogous to the 'public interest' standard rejected by the Supreme Court in the context of Exemption Five." *Bloomberg*, 601 F.3d at 150 (citing *Merrill*, 443 U.S. at 354). The Second Circuit continued, "a test that permits an agency to deny disclosure because the agency thinks it best to do so (or convinces a court to think so, by logic or deference) would undermine 'the basic policy that disclosure, not secrecy, is the dominant objective of [FOIA].'" *Id.* at 151 (quoting *Rose*, 425 U.S. at 361) (alteration in the original). Thus, while the Second Circuit's rejection of the program effectiveness test might be at odds with the D.C. and the First Circuit's interpretation of Exemption 4, it is wholly consistent with the underlying reasons for this Court's rejection of that same test in the context of Exemption 5. As a

result, there is no compelling reason to review the Second Circuit's decision.

Moreover, as the Second Circuit correctly noted, the expansion of FOIA's exemptions is the province of the Congress, not the courts:

> The requirement of disclosure under FOIA and its proper limits are matters of congressional policy. The statute as written by Congress sets forth no basis for the exemption the Board asks us to read into it. If the Board believes such an exemption would better serve the national interest, it should ask Congress to amend the statute.

Id. Indeed, subsequent to the Second Circuit's decision, Congress enacted the Dodd-Frank Act to establish specific requirements for disclosure of the specific type of information requested by Bloomberg regarding the Lending Facilities. Simply put, Congress has spoken.

Further, the judicially-created "program effectiveness" prong of Exemption 4 was designed to protect *governmental*, not private, interests. *National Parks*, 498 F.2d at 770 n.17. Here, the government has not sought Supreme Court review, presumably in recognition of the fact that Congress has now spoken on this issue. But whatever the reason, the absence of governmental support for the Clearing House's petition belies the Clearing House's contention that Court intervention is necessary to ensure the continued effectiveness of the Lending Facilities.

In addition, release of the historical information requested by Bloomberg here – which, because of the delay tactics by the Board and the Clearing House is now almost three years old – will have no impact whatsoever on the effectiveness of the Fed's lending programs in the future.[9] Indeed, the Dodd-Frank Act has established clear rules mandating the disclosure of this type of information at specific times. Thus, the Board's disclosure of future lending will be compelled by those rules, and will be wholly unaffected by the ultimate outcome of this case.[10] And to the extent that the question of

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9 The Clearing House's speculation that disclosure of the requested information "threatens to harm the borrowing banks" by allowing the public to "draw inferences" about the banks' "current financial conditions" (Petition at 4) is likewise unfounded. The Board's December 1st disclosures of practically identical information pursuant to the Dodd-Frank Act caused no such harm. None of the borrowing banks implicated in the December 1st disclosures experienced a run by their depositors. And, as noted above, the stock market rose sharply that day.

10 In any event, the information that Bloomberg seeks here is now commercially stale, thus eliminating any potential competitive harm – a requirement of Exemption 4 – that the Clearing House speculates might flow from its release. Indeed, various courts have recognized, in the FOIA context, that the passage of time can eliminate competitive harms that *might* have flowed from more immediate release of sensitive information. *See Merrill*, 443 U.S. at 363 (recognizing that where certain directives requested under FOIA contained sensitive information and "immediate release of these Directives would significantly harm the Government's monetary functions or commercial interests," then a slight delay in the publication of the directives would be appropriate); *Hack v. Dep't of Energy*, 538 F. Supp. 1098, 1104 (D.D.C. 1982)

whether Exemption 4 does in fact encompass a "program effectiveness" test arises in future FOIA cases in other contexts, the issue can be resolved in those cases rather than here, where the dispute is effectively moot.

Finally, until the Second Circuit's decision here, no other Circuit Court besides the D.C. and First Circuits has either adopted or rejected the program effectiveness test in Exemption 4.[11] Because only three Circuit Courts have addressed this issue, it has not had sufficient time to percolate at the Circuit Court level. That is reason enough for the Court to deny the petition.

For all of these reasons, the Second Circuit's rejection of the "program effectiveness" test does not present a "compelling reason" for granting the Clearing House's petition.

(government agency allowed to withhold certain information in response to FOIA request "until the contract for the project has been let"); *Ctr. for Pub. Integrity v. Dep't of Energy*, 191 F. Supp. 2d 187, 195 (D.D.C. 2002) ("Courts have recognized that the passage of time can mitigate the potential for harm that might otherwise have resulted from the release of commercial information."). The impact of the passage of time on potential competitive harm has been taken into account by Congress in its adoption of the Dodd-Frank Act.

[11] In *Nadler v. Federal Deposit Insurance Corp.*, 92 F.3d 93 (2d Cir. 1996), the Second Circuit expressly stated that it did "not reach the issue whether the district court properly afforded relief to the FDIC on the basis of the 'program effectiveness' exemption." *Id.* at 96.

IV. FURTHER DELAY WOULD BE INIMICABLE TO FOIA'S ESSENTIAL COMMAND THAT NON-EXEMPT AGENCY RECORDS BE DISCLOSED WITHOUT UNDUE DELAY.

In enacting FOIA, "Congress sought to open agency action to the light of public scrutiny. Congress did so by requiring agencies to adhere to a general philosophy of full agency disclosure. Congress believed that this philosophy, put into practice, would help ensure an informed citizenry, vital to the functioning of a democratic society." *U.S. Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 142 (1989) (internal quotations and citations omitted); *see also* H.R. Rep. No. 89-1497, at 33 (1966) ("a democratic society requires an informed, intelligent electorate, and the intelligence of the electorate varies as the quantity and quality of its information varies").

FOIA also reflects the Congress's conclusion that greater disclosure will engender greater public confidence in our government: "A government by secrecy benefits no one. It injures the people it seeks to serve; it injures its own integrity and operations. It breeds mistrust, dampens the fervor of its citizens, and mocks their loyalty." S. Rep. No. 89-813, at 45 (1965).

In short, by allowing the public to know "what the Government is up to," FOIA leads to a better-informed citizenry with greater confidence in its public institutions. *U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 750 (1989).

FOIA's commands would be rendered hollow if agencies and their private sector allies were allowed serially to invoke procedural devices to delay disclosure. "[U]nreasonable delays in disclosing nonexempt documents violate the intent and purpose of the FOIA, and courts have a duty to prevent these abuses." *Long v. IRS*, 693 F.3d 907, 910 (9th Cir. 1982). The Congress has echoed this when it amended the FOIA in 2007 to try to stem agency unresponsiveness: "Federal agencies have become less and less responsive to requests for information ... [t]axpayers should have the opportunity to obtain information from the Federal Government quickly and easily." 153 Cong. Rec. S15701-04 (Dec. 14, 2007) (statement of Rep. Smith) (*cited by Judicial Watch, Inc. v. Bureau of Land Mgmt.*, 562 F. Supp. 2d 159, 175 (D.D.C. 2009)).

Despite orders from the District Court and the Court of Appeals directing disclosure, it took an Act of Congress to force the Board finally to reveal, 925 days after Bloomberg's request, any of the information encompassed by that request. Apparently recognizing that further litigation is not warranted, the Solicitor General has chosen not to seek this Court's review. Bloomberg respectfully submits that disclosure of the remaining information encompassed by Bloomberg's request has been delayed for far too long, and that this Court ought not to allow the Clearing House's petition to extend that delay even longer.

CONCLUSION

The Clearing House's petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 10-543

In the Supreme Court of the United States

THE CLEARING HOUSE ASSOCIATION, L.L.C.,
PETITIONER

v.

BLOOMBERG, L.P., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Exemption 4 of the Freedom of Information Act authorizes the withholding of "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. 552(b)(4). In this case, the Board of Governors of the Federal Reserve System (Board) withheld the names, loan amounts, and loan dates of individual borrowers that requested loans from the discount window and Federal Reserve emergency lending facilities after concluding that release of such information would harm the competitive position of the borrowers and would impair the Board's future ability to maintain stability in financial markets. The questions presented are as follows:

1. Whether the court of appeals erred in holding that the information at issue was not "obtained from a person" within the meaning of Exemption 4 because the information resulted from the agency's own executive actions in granting the loans and thus was not obtained from the borrowers.

2. Whether the court of appeals erred in holding that the fact that disclosure of the information would harm the agency's ability to carry out its functions does not make the information "confidential" within the meaning of Exemption 4.

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In the Supreme Court of the United States

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THE CLEARING HOUSE ASSOCIATION, L.L.C.,
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BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 601 F.3d 143. The opinion and order of the district court (Pet. App. 20a-60a) is reported at 649 F. Supp. 2d 262.

JURISDICTION

The judgment of the court of appeals was entered on March 19, 2010. A petition for rehearing was denied on August 20, 2010 (Pet. App. 16a-19a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Federal Reserve Act, 12 U.S.C. 221 *et seq.*, provides that the Board of Governors of the Federal Reserve System (Board), along with the Federal Open Market Committee, "shall maintain long run growth of the monetary and credit aggregates commensurate with the economy's long run potential to increase production, so as to promote effectively the goals of maximum employment, stable prices, and moderate long-term interest rates." 12 U.S.C. 225a. The Federal Reserve Act vests lending authority in the regional Federal Reserve Banks and the power to authorize and supervise lending in the Board. 12 U.S.C. 347b(a); see also 12 U.S.C. 301, 248(j), 343.

The discount window is a permanent lending program through which the twelve regional Federal Reserve Banks, subject to Board regulation and supervision, lend funds on a secured, short-term basis to eligible depository institutions in their districts. C.A. App. A67. In response to the recent financial crisis, the Board authorized the Reserve Banks to initiate a number of additional, temporary special credit and liquidity facilities to relieve severe liquidity strains on the market and reduce risks to financial stability. Specifically, in the latter part of 2007, the Board authorized the Reserve Banks, under Section 10B of the Federal Reserve Act, 12 U.S.C. 347b(a), to establish the Term Auction Facility, which provided longer than overnight funding to depository institutions with interest rates determined at auction. In early 2008, as financial market conditions continued to deteriorate, the Board authorized the Reserve Banks, under the emergency authority of Section 13(3) of the Federal Reserve Act, 12 U.S.C. 343, to initiate programs, including: the Primary Dealer Credit

Facility, under which the Federal Reserve Bank of New York made overnight funds available to "primary dealers"[1] that are not eligible to borrow at the discount window, and the Term Securities Lending Facility, which provided for 28-day loans of Treasury securities. C.A. App. A68-A70.

In the past, the Board and the Federal Reserve Banks have released extensive public information about lending made under such programs, including the terms of loans, eligibility requirements, current and historical lending data, and types and value of collateral accepted. C.A. App. A72-A73. That information, however, generally has been released in the aggregate for each Federal Reserve district and facility and has not been broken down by borrower or by specific loan. Thus, historically speaking, neither the Board nor the Reserve Banks have disclosed information regarding individual loans, such as the names of individual borrowers, or the amounts, dates, or specific collateral pledged for specific loans. *Id.* at A73.

The Board views such information as sensitive and confidential because Reserve Banks act as "lenders of last resort" to depository institutions and primary dealers unable to secure funding from market sources on a short-term basis. C.A. App. A74. Although healthy financial institutions also borrow from Reserve Banks for ordinary operational reasons, and to obtain liquidity in markets that are temporarily closed to participants, the Reserve Banks' role as lenders of last resort to institutions unable to secure short-term funds in the market

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[1] Primary dealers are designated banks and securities brokers with which the Federal Reserve Bank of New York trades U.S. government securities as counterparties in executing open market operations. C.A. App. A86.

results in a stigma associated with borrowing from them. *Id.* at A74-A75. That stigma can cause significant competitive injury to financial institutions should information regarding individual loans become public. *Ibid.* Moreover, the Board has concluded that if depository institutions and primary dealers were unwilling to come to the Reserve Banks for their funding needs, particularly in times of economic crisis, the Board's ability to administer lending programs crucial to maintaining national financial and economic stability would be severely undermined. *Id.* at A79-A82.

2. On May 21, 2008, Bloomberg L.P. (a respondent in this Court) filed a request with the Board under the Freedom of Information Act (FOIA), 5 U.S.C. 552 *et seq.*, seeking information relating to the rates, terms, and collateral posted for individual loans made through the programs described above between April 4, 2008 and May 20, 2008. C.A. App. A50-A51. After providing several responsive records, the Board withheld approximately 231 pages of Remaining Term Reports (Reports) responsive to the request. The Reports are prepared by the staff of the Board's Division of Monetary Affairs using raw data provided by each Reserve Bank. The Reports show outstanding extensions of credit under the discount window and emergency lending programs. *Id.* at A38-A39. The Reports also contain the names of borrowers that requested loans, the originating Reserve Bank district, individual loan amounts, the type of lending program borrowed from, and loan origination and maturity dates. *Ibid.*

The Board withheld the Reports under FOIA Exemption 4, which exempts from disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential."

5 U.S.C. 552(b)(4).[2] The Board explained that disclosure of the Reports would reveal the identities of the institutions that sought funds from the Reserve Banks under "last resort" lending programs, and thus would likely cause substantial competitive injury to those institutions that provided the information at issue to the Reserve Banks. C.A. App. A57. In addition, the Board explained that the future reluctance of institutions to participate in such lending programs would impair the Board's ability to carry out statutory functions in a time of economic crisis. *Id.* at A57-A58.

3. On November 7, 2008, Bloomberg filed this FOIA action in federal district court. The district court granted partial summary judgment in favor of Bloomberg, rejecting the Board's Exemption 4 argument and ordering the release of the information at issue here. Pet. App. 20a-60a. The court held that with the exception of the borrowers' names, the Reports do not contain information "obtained from a person," reasoning that "[t]he fact that the [Reserve Banks] themselves generated the information contained in the Remaining Term Reports is sufficient to vitiate the applicability of Exemption 4." *Id.* at 48a-51a.

The district court further held that none of the information was "privileged or confidential," because in its view disclosure would neither impair the government's ability to obtain such information in the future nor cause substantial harm to the competitive position of the bor-

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[2] The Board also invoked FOIA Exemption 5, which exempts from disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. 552(b)(5). Because the Board did not rely on Exemption 5 after the district court proceedings, this brief does not discuss it further.

rowing institutions from which the information was obtained. See Pet. App. 51a-56a (citing *National Parks & Conservation Ass'n* v. *Morton*, 498 F.2d 765 (D.C. Cir. 1974)). The latter determination was based on the court's conclusion that disclosure would not affect the borrowers' competitive position because any harm would not be "from the affirmative use of the disclosed information *by their competitors*." *Id.* at 55a. Refusing to recognize a "program effectiveness" test, the court also rejected the Board's alternative argument that the commercial and financial information in the Reports is "privileged or confidential" because its release would substantially undermine the Board's ability to administer lending programs crucial to maintaining market stability. *Id.* at 52a-53a n.15.

4. The court of appeals affirmed. Pet. App. 1a-15a. The court first held that the individual loan information was not "obtained from a person" (*i.e.*, the borrowing institutions) as required by Exemption 4. The court acknowledged that a loan application would be "obtained from a person," but reasoned that "Bloomberg's FOIA request does not seek loan applications; it seeks documents that show what loans the Federal Reserve Banks actually made." *Id.* at 8a-9a. The court of appeals stated that "what is requested is not merely the information collected and slightly reprocessed by the government, but disclosure of the agency's own executive actions." *Id.* at 10a. The court explained that "even if the loans were granted automatically, they did not come into existence until the Federal Reserve Bank took executive action by granting the loan. The only information sought is a summary report of actions that were taken by the government. And it cannot be said that the gov-

ernment 'obtained' information as to its own acts and doings from external sources or persons." *Id.* at 12a.

The court of appeals also rejected the Board's alternative argument that the information on individual borrowers was protected under Exemption 4 because it was confidential commercial information obtained by the Board from the Reserve Banks. The court declined to decide whether the individual Reserve Banks that submitted the information to the Board are "persons" for purposes of Exemption 4. Pet. App. 12a n.2. Rather, the court held that the information was not "confidential." The court explained that information is confidential for purposes of Exemption 4 if its disclosure would have the effect of harming "the competitive position of the person from whom the information was obtained." *Id.* at 13a (quoting *Inner City Press/Cmty. on the Move* v. *Board of Governors*, 463 F.3d 239, 244 (2d Cir. 2006)). The court concluded that because the Board did not allege that the relevant "person" in this instance—the Reserve Bank itself—suffered any competitive harm, the information could not be deemed "confidential" under that test. *Ibid.*

The court of appeals then declined to "extend" the scope of Exemption 4's "confidential" requirement to cover information that, if disclosed, would harm the Board's ability to carry out its mission or undermine program effectiveness. Pet. App. 13a-14a. The court held that the "program effectiveness" test, previously endorsed by the First and D.C. Circuits, "would give impermissible deference to the agency, and would be analogous to the 'public interest' standard rejected by the Supreme Court in the context of Exemption Five." *Id.* at 14a (citing *Federal Open Mkt. Comm. of the Fed. Reserve Sys.* v. *Merrill*, 443 U.S. 340, 354 (1979)).

5. On May 3, 2010, the Board and intervenor Clearing House Association, L.L.C. (petitioner in this Court) filed petitions for rehearing en banc. The petitions challenged the panel's holding that the information at issue was not "obtained from a person," as well as its holding that a "program effectiveness" test for confidentiality is not cognizable under Exemption 4. The court of appeals denied the petitions on August 20, 2010. Pet. App. 16a-19a.

6. On July 21, 2010, while the petitions for rehearing were pending, the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act or Act), Pub. L. No. 111-203, 124 Stat. 1376, became law. The Dodd-Frank Act required the release of some of the information that had been withheld by the Board pursuant to Exemption 4 and also established prospective standards governing the disclosure (after specified intervals) of loan-related information of the type at issue in this case.

a. Section 1109(c) of the Dodd-Frank Act required the Board to "publish on its website, not later than December 1, 2010," certain information concerning emergency lending facilities authorized by Section 13(3) of the Federal Reserve Act from December 1, 2007 through July 21, 2010. § 1109(c), 124 Stat. 2129. Those facilities include three of the facilities at issue in this case: the Term Auction Facility, the Primary Dealer Credit Facility, and the Term Securities Lending Facility (see pp. 2-3, *supra*). Under the Act, the Board must disclose: (1) the names of recipients of assistance; (2) the type of assistance provided; (3) the value or amount of assistance; (4) the dates; and (5) the specific terms of any repayment expected, including interest rate and collateral. § 1109(c)(1)-(5), 124 Stat. 2129. Consistent with its obligation under the Act, the Board disclosed

that information on December 1, 2010. As a result of the Board's recent disclosure, the part of the FOIA request pertaining to the emergency lending facilities has been rendered moot. The only information remaining at issue in this case concerns lending from the discount window.

b. Section 1103 of the Dodd-Frank Act establishes prospective standards for the protection and subsequent release of information concerning lending under both the discount window and emergency lending programs. Those prospective standards apply to "information concerning the borrowers and counterparties participating in emergency credit facilities, discount window lending programs, and open market operations authorized or conducted by the Board or a Federal reserve bank." § 1103(b), 124 Stat. 2118. For transactions executed after its effective date (July 21, 2010), the Act sets a schedule of delayed disclosure of (1) "the names and identifying details of each borrower, participant, or counterparty"; (2) "the amount borrowed"; (3) "the interest rate or discount paid"; and (4) "information identifying the types and amounts of collateral pledged." *Ibid.*

The Dodd-Frank Act does not, however, require immediate release of such information. For emergency lending facilities created under Section 13(3) of the Federal Reserve Act, the information must be released one year after the effective date of termination of the authorization of the facility. § 1103(b), 124 Stat. 2118. With respect to discount window and open market operations, the information must be released by "the last day of the eighth calendar quarter following the calendar quarter in which the covered transaction was conducted." *Ibid.* The Chairman of the Board may publicly release this information earlier if he determines that such disclosure

would be in the public interest and would not harm the effectiveness of the relevant credit facility. § 1103(b), 124 Stat. 2118-2119. For all of the loans subject to this section, the information "shall be confidential," including for purposes of FOIA, until the mandatory release date (unless the Chairman determines to release it earlier). § 1103(b), 124 Stat. 2119.

As noted above, the new standards set forth in Section 1103 operate only on a prospective basis. Section 1103(b) provides that "[n]othing in this section is meant to affect any pending litigation or lawsuit filed under [FOIA] on or before the date of enactment [of the Act]." 124 Stat. 2120.

ARGUMENT

The court of appeals erred in rejecting the applicability of Exemption 4 in two respects: (1) in holding that transaction details such as the names of borrowers, loan amounts, and maturity dates were not "obtained from" the borrowers because they reflect "the agency's own executive actions" (Pet. App. 10a); and (2) in holding, contrary to decisions of the First and D.C. Circuits, that harm to the agency's ability to carry out its functions if the information is released does not make the information "confidential" (*id.* at 13a-14a). Notwithstanding those errors, this Court's review is not warranted here. As a result of the enactment of the Dodd-Frank Act, the Board recently has disclosed some of the information sought by the FOIA request regarding the emergency lending programs (*i.e.*, the special facilities other than the discount window). Moreover, while the case is not moot in light of the remaining discount-window information from 2008, the court of appeals' decision will not affect future requests for information concerning the

discount window and emergency lending programs. That is because the Dodd-Frank Act sets prospective standards governing the release of that information after specified periods of time. The questions presented thus will not arise again in this context.

1. FOIA Exemption 4 authorizes the withholding of "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. 552(b)(4). The court of appeals imparted an unduly narrow reading of Exemption 4 in applying that provision to the circumstances of this case.

a. The court of appeals erred in holding that none of the information at issue had been "obtained from a person," *i.e.*, the borrowing institutions. It is uncontested that the borrowing institutions are "persons" for purposes of Exemption 4. Pet. App. 8a. And, as the district court recognized (*id.* at 49a), it cannot reasonably be disputed that the Reserve Banks obtained at least the names of the borrowers from the borrowers themselves. The court of appeals' categorical approach, however, does not acknowledge even that the borrowers' names were "obtained from a person" within the meaning of Exemption 4.[3]

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[3] While a company's identity may not normally be considered "privileged or confidential," its identity on a list of borrowers at the discount window is confidential because it reveals confidential information about the company—that it applied for a discount window loan. See, *e.g.*, *Board of Trade* v. *CFTC*, 627 F.2d 392, 402-403 (D.C. Cir. 1980) (names of trade sources can be protected under Exemption 4 if revealing them in context would reveal confidential commercial information); *Inner City Press/Cmty. on the Move* v. *Board of Governors*, 463 F.3d 239, 244 (2d Cir. 2006) (recognizing that company names on a list of subprime lenders is "commercial or financial" in character). In any event, the court of appeals did not reach this issue.

The decision of the court of appeals rests on the mistaken premise that information provided to the government ceases to be information "obtained from a person" if that information is reflected in the "agency's own executive actions." Pet. App. 10a. Other courts have not taken that position, and several district court decisions have held that information similar to the identifying information at issue here was "obtained from a person" within the meaning of Exemption 4. See *Clarke* v. *United States Dep't of Treasury*, No. 84-1873, 1986 WL 1234, at *2 (E.D. Pa. Jan. 28, 1986) (transaction details for government sale of a type of U.S. Treasury bond consists of information "obtained from persons outside the government"); *Public Citizen Health Research Group* v. *NIH*, 209 F. Supp. 2d 37, 44 (D.D.C. 2002) (information about royalty revenues received by NIH from licensing agreements negotiated with outside parties deemed to be "obtained from a person"); *Judicial Watch, Inc.* v. *Export-Import Bank*, 108 F. Supp. 2d 19, 28 (D.D.C. 2000) (information pertaining to application for and grant of export insurance by government bank constitutes information "obtained from a person"); *Comstock Int'l (U.S.A.), Inc.* v. *Export-Import Bank*, 464 F. Supp. 804, 807 (D.D.C. 1979) (protecting under Exemption 4 a loan agreement between third party and government bank); *Freeman* v. *Bureau of Land Mgmt.*, 526 F. Supp. 2d 1178, 1188 (D. Or. 2007) (government data not outside Exemption 4 where it "piggybacks" on data obtained from private party); but see *Buffalo Evening News, Inc.* v. *Small Bus. Admin.*, 666 F. Supp. 467 (W.D.N.Y. 1987) (declining Exemption 4 protection because loan information at issue was "generated by the [Small Business Administration] in the course of its involvement with its borrowers"). Similarly, albeit with-

out addressing the "obtained from a person" requirement, the D.C. Circuit has applied Exemption 4 to line-item pricing in government contracts even though the prices resulted in part from government action. See, *e.g.*, *Canadian Commercial Corp.* v. *Department of the Air Force*, 514 F.3d 37, 40-41 (2008); *McDonnell Douglas Corp.* v. *NASA*, 180 F.3d 303, 304 (1999).

The court of appeals nevertheless found the Reserve Banks' grant of the loans to be talismanic, so as to take the information outside the scope of Exemption 4. See Pet. App. 12a ("[E]ven if the loans were granted automatically, they did not come into existence until the Federal Reserve Bank took executive action by granting the loan."). But that ignores the crucial fact that the information sought by Bloomberg is essentially the same as that provided by the borrowers. At the very least, the information supplied by the borrowers in their loan applications is inextricably intertwined with the information sought by Bloomberg regarding the ultimate loan terms. And because disclosure of information about the loan terms would tend to identify the borrowers, it is also inextricably intertwined with the names of the borrowers themselves (which, as noted above, are plainly "obtained from" the borrowers alone). Because it is well established under FOIA that non-exempt information "inextricably intertwined" with exempt information is protected from disclosure, that provides another basis for the government to withhold the information at issue. *E.g.*, *Inner City Press*, 463 F.3d at 249 n.10; see 5 U.S.C. 552(b) (requiring release of any "reasonably segregable" non-exempt information "after deletion of the portions which are exempt"); cf. *FBI* v. *Abramson*, 456 U.S. 615, 625 (1982) (conferring protection from disclosure under FOIA "that part of an otherwise non-exempt compilation

which essentially reproduces and is substantially the equivalent of all or part of an earlier [exempt] record").

b. The court of appeals—after assuming that the information was "obtained from" the Reserve Banks and that a Reserve Bank is a "person," Pet. App. 12a & n.2—erred in holding that the information was not "confidential" for purposes of Exemption 4. In *National Parks & Conservation Ass'n* v. *Morton*, 498 F.2d 765 (1974), the D.C. Circuit stated information is "confidential" if its disclosure would either (1) "impair the Government's ability to obtain necessary information in the future"; or (2) "cause substantial harm to the competitive position of the person from whom the information was obtained." *Id.* at 770. The Second Circuit had adopted that formulation previously, and the court of appeals relied on it in this case. See Pet. App. 13a (citing *Inner City Press*, 463 F.3d at 244).[4]

As the D.C. Circuit itself has made clear, however, "the two interests identified in the *National Parks* test are not exclusive." *Critical Mass Energy Project* v. *NRC*, 975 F.2d 871, 879 (1992) (en banc), cert. denied, 507 U.S. 984 (1993); cf. *National Parks*, 498 F.2d at 770 n.17 (expressing "no opinion as to whether other governmental interests are embodied" in Exemption 4, such as "program effectiveness"). The D.C. Circuit subsequently cited with approval "the First Circuit's conclusion" in *9 to 5 Organization for Women Office Workers* v. *Board of Governors*, 721 F.2d 1, 11 (1983), "that the exemption also protects a governmental interest in ad-

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[4] The Board did not argue that the information satisfied the first prong of the *National Parks* test, and the court of appeals found that it did not satisfy the second prong because the Board did not allege any competitive harm to the Reserve Banks themselves (as opposed to the borrowing institutions). Pet. App. 13a.

ministrative efficiency and effectiveness." *Critical Mass Energy Project*, 975 F.2d at 879.

The Second Circuit did not question the Board's showing, "plausible, and forcefully made" (Pet. App. 15a), that requiring disclosure of the information here would significantly impair the Board's future ability to use discount window and emergency lending programs to control short-term interest rates, provide much needed liquidity, and maintain market stability. The court nevertheless concluded that such harm is not relevant to assessing the confidentiality of the information because Exemption 4 does not "encompass the so-called 'program effectiveness' test." *Id.* at 13a.

The court of appeals appears to have misunderstood the nature of the "program effectiveness" standard. As various district courts have recognized, the purposes underlying Exemption 4 are furthered through the "program effectiveness" standard by protecting sensitive commercial or financial information about participants in government loan, grant, and licensing-type programs where disclosure would demonstrably undermine the basic objectives of those programs. See, *e.g.*, *Judicial Watch, Inc.*, 108 F. Supp. 2d at 30 (interest in promoting government's provision of export insurance); *Africa Fund* v. *Mosbacher*, No. 92-CIV-289, 1993 WL 183736, at *7 (S.D.N.Y. May 26, 1993) (interest in promoting export control system); *Clarke*, 1986 WL 1234, at *2-*3 (interest in promoting purchase of U.S. securities). That is because Exemption 4 is intended both "for the benefit of persons who supply information" *and* for the benefit of "the agencies which gather it." *National Parks*, 498 F.2d at 770.

The court of appeals mistakenly concluded that the program effectiveness test was the "functional equiva-

lent" of the "public interest" standard for withholding under Exemption 5, which this Court rejected in *Federal Open Market Committee of Federal Reserve System* v. *Merrill*, 443 U.S. 340, 354 (1979). Pet. App. 15a. The court of appeals believed that the standard rejected in *Merrill* would have permitted an agency to withhold "any memoranda * * * whenever the agency concluded that disclosure would not promote the 'efficiency' of its operations or otherwise would not be in the 'public interest.'" *Ibid.* The program effectiveness test under Exemption 4, however, creates no such unfettered discretion to withhold information. The test is far more limited: it applies only to "trade secrets and commercial or financial information" "obtained from a person," 5 U.S.C. 552(b)(4), and not to "any memoranda" as in *Merrill*. The standard therefore applies only in the commercial or financial context, and requires evidence identifying the "particular interest" involved and showing "how that interest will be harmed by public disclosure of the specific information which has been requested." *9 to 5*, 721 F.2d at 10.

The Board made that showing here. Unrebutted record evidence shows that, because of the stigma associated with use of the discount window and the emergency lending facilities, institutions will be deterred from borrowing from the Reserve Banks if their identities are made publicly available—even if the institution is not facing financial problems. The lack of willing borrowers would in turn significantly impair the Board's ability to use such lending facilities to achieve its statutory monetary policy mandates: "to promote effectively the goals of maximum employment, stable prices, and moderate long-term interest rates," 12 U.S.C. 225a; to provide liquidity to depository institutions, 12 U.S.C. 347b(a);

and to provide emergency liquidity to individuals, partnerships, and corporations in "unusual and exigent circumstances," 12 U.S.C. 343. C.A. App. 79-82. Contrary to the decision below, such consequences should bear on the Exemption 4 analysis.

2. Notwithstanding the court of appeals' errors, this case does not warrant further review. Through the intervening enactment of the Dodd-Frank Act, Congress has resolved the question of whether and when the type of information at issue in this case must be disclosed on a forward-going basis, for post-enactment loans.

On December 1, 2010, pursuant to the Dodd-Frank Act (§1109(c), 124 Stat. 2129), the Board released some of the very information—the pre-enactment Section 13(3) loan information—sought in this litigation. Although the case is not moot because the Dodd-Frank Act does not apply to the remaining pre-enactment discount-window information at issue, the Act's prospective standards ensure that the specific issue will not recur for post-enactment loans covered by the Act. For transactions occurring after July 21, 2010, the Dodd-Frank Act resolves any question about the application of FOIA to information related to loans from both the discount window and Section 13(3) emergency lending programs. Congress struck a balance between the government's interest in preserving the confidentiality of the Board's discount- window and emergency-loan related information and the public interest in disclosure of such information. The Act protects such information from disclosure under FOIA for a set period of time (one or two years), after which point the information must be released. § 1103(b)(1)-(3), 124 Stat. 2118-2119; see pp. 8-10, *supra*. The Act governs precisely the type of information sought in this case. That means any holding as

to Exemption 4's applicability to this information will have no impact on future FOIA requests for such information.

To be sure, the government does not intend to suggest that the questions presented are unimportant or that they would not warrant this Court's review in an appropriate case. If, as petitioner posits (Pet. 26-27), the decision of the court of appeals is followed by other courts or applied in other contexts in a way that impairs the operation of other agency programs, this Court could consider whether to grant review in a future case and correct the court of appeals' errors at that time. In light of the Dodd-Frank Act, however, this case is not an appropriate vehicle in which to do so.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

THE CLEARING HOUSE ASSOCIATION L.L.C.,
Petitioner,

—v.—

BLOOMBERG L.P. and THE BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM,
Respondents.

THE CLEARING HOUSE ASSOCIATION L.L.C.,
Petitioner,

—v.—

FOX NEWS NETWORK, LLC, and THE BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

The Solicitor General agrees that the Second Circuit erred in issuing two categorical and important interpretations of Exemption 4 of the Freedom of Information Act ("FOIA")—specifically, that (1) commercially sensitive third-party information is not "obtained from a person" once subject to "executive action"; and (2) a federal agency cannot withhold such information on the basis that its disclosure would harm the effectiveness of its programs.

The Second Circuit's erroneous rulings, if permitted to stand, will harm numerous federal programs and third parties that participate in those programs, by eliminating FOIA Exemption 4 protection over the commercially sensitive final terms on which third parties and federal agencies transact with each other.

As the Solicitor General recognizes, the Second Circuit openly split with the D.C. and First Circuits in holding that FOIA Exemption 4 does not protect a federal agency's interest in the effectiveness of its programs, and effectively split with the D.C. Circuit and numerous district courts over whether Exemption 4 protects the final terms of agency commercial transactions with third parties (*e.g.*, line-item pricing information in federal contracts, government royalty rates, and transaction-level details of government-issued insurance, loans, and bonds).

Despite recognizing that the Second Circuit erred on important questions of FOIA law, the

Solicitor General recommends that this Court deny certiorari on grounds unrelated to the merits—that is, because the Dodd-Frank Act creates a new disclosure regime for future Discount Window lending. Though all parties agree that the Act's enactment does not moot this appeal, the Solicitor General believes that the Court should not grant certiorari *in this case*, because this new regime means that the Federal Reserve Board will not be confronted with specific FOIA requests for post-enactment Discount Window lending data.

The Solicitor General's recommendation is short-sighted and unpersuasive, because this Court does not decide whether to grant certiorari based on whether the *specific factual situation* leading to the decision below will recur, but on the breadth and importance of the *legal rulings* rendered in that decision. The time for this Court to review the Second Circuit's important (and erroneous) rulings is now, and not in some hoped-for "future case." This circuit split is between the two most important circuits on issues of FOIA law: the Second Circuit (the media and financial capital of the country) and the D.C. Circuit (the leading circuit on FOIA law).

As a practical matter, it is difficult to correct erroneous circuit court rulings interpreting the FOIA. In the Second Circuit, going forward, any FOIA requester will be able to bind an agency to that Circuit's erroneous law, under the threat of attorney's fees and costs if the requester must force compliance through court action. And, even if the agency contests the FOIA request in federal court, it

is unlikely that courts in the Second Circuit would stay any adverse ruling to allow for further appeals.

The Second Circuit itself, recognizing the importance of the legal issues presented here, stayed its rulings to allow for this Court's review, even after the enactment of the Dodd-Frank Act. But, if this Court denies certiorari, "future cases" likely will become moot before affected parties can seek certiorari.

I. THIS CASE IS THE IDEAL VEHICLE FOR CORRECTING THE SECOND CIRCUIT'S ERRORS IN INTERPRETING IMPORTANT PROVISIONS OF THE FOIA.

A. The Dodd-Frank Act Did Not Moot this Appeal.

All Respondents agree that the Dodd-Frank Act did not moot this appeal. (*See* Brief for the Federal Respondent ("SG Br.")[1] at 9, 10, 17; Fox Br. at 19; Bloomberg Br. at 2.) Indeed, Section 1103(b) of the Dodd-Frank Act expressly states that nothing in its new disclosure provisions is "meant to affect any pending litigation or lawsuit filed under [FOIA] on or before the date of [the Act's] enactment."

Instead, Bloomberg and Fox contend that the Act either "effectively mooted" this appeal or

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[1] References to the Solicitor General's brief, The Clearing House's petition in support of certiorari ("Clearing House Br."), and the appendix are to those filed in *The Clearing House Association L.L.C.* v. *Bloomberg*, No. 10-543.

confirmed that the requested information is commercially "stale." (Bloomberg Br. at 2; Fox Br. at 20.) Not so. Tellingly, while requiring the Federal Reserve Board to disclose transaction-level details of *emergency* lending that took place prior to the Act, Congress specifically did *not* require release of pre-enactment *Discount Window* lending data. This differentiation confirms the Board's longstanding and express promise to banks that the details of their Discount Window lending would be kept confidential.

When this same "staleness" argument was raised below, the Second Circuit chose *not* to resolve the appeal on this ground. In fact, the Second Circuit did not question the "plausible" and "forcefully made" arguments by The Clearing House and the Federal Reserve Board that disclosure of the Discount Window information would "harm the banks that borrowed" and "the banking system as a whole." (15a.)

B. The Dodd-Frank Act Does Not Lessen the Importance of the Second Circuit's Novel and Categorical FOIA Rulings.

The Solicitor General recognizes that the Second Circuit ruled "categorical[ly]" that third-party confidential information ceases to be "obtained from a person" once reflected in an agency's "executive action." (SG Br. at 11-12.) The Solicitor General further agrees that the Second Circuit split with the D.C. and First Circuits in rejecting the "program effectiveness" test. (*Id.* at 14-15.) Thus,

like the Second Circuit, which stayed its mandate in both *Bloomberg* and *Fox* based on the reasonable probability that four justices would grant certiorari, the Solicitor General "does not intend to suggest that the questions presented [in The Clearing House's petition] are unimportant or that they would not warrant this Court's review in an appropriate case." (*Id.* at 18.)

Instead, after spending almost seven pages explaining why the Second Circuit's categorical FOIA rulings are wrong, the Solicitor General concludes, perfunctorily, that this case may not be the proper vehicle for this Court's review. The Solicitor General does so by reasoning that "the specific issue" in this case—*i.e.*, whether a FOIA requester is entitled to Discount Window lending data—"will not recur for post-enactment loans covered by the Act." (SG Br. at 17.) Thus, the Solicitor General suggests that this Court await a "future case" to "correct the court of appeals' errors." (*Id.* at 18.)

This suggestion is unpersuasive. *First*, the Solicitor General cites no authority for its statement that certiorari is not appropriate unless the specific factual "context" giving rise to the appeal will recur. (SG Br. at 11.) This omission is not surprising, because this Court's exercise of its certiorari review turns *not* on the recurrence of the *specific facts* leading to the rulings on appeal, but the likely impact of those legal rulings *in other contexts*. This principle is demonstrated time and again in FOIA law, where the Court has granted certiorari to review legal rulings in cases involving non-recurring requests for unique documents. *See, e.g.*, *U.S. Dep't*

of State v. *Washington Post Co.*, 456 U.S. 595, 596, 598 (1982) (certiorari granted to review "construction of 'similar files' language" of Exemption 6 in case concerning "documents indicating whether [two Iranian nationals] hold valid U.S. passports"); *Nat'l Archives & Records Admin.* v. *Favish*, 541 U.S. 157, 164 (2004) (certiorari granted "to resolve a conflict in the Courts of Appeals over the proper interpretation of Exemption 7(C)" in case involving 11 death-scene photographs).

Second, it is not clear when or even if there will be the right "future case" that would allow this Court to correct the Second Circuit's errors. (SG Br. at 18.) An erroneous circuit court ruling in FOIA law—particularly one that binds the Nation's financial and media capital—presents unique concerns. Under 5 U.S.C. § 552(a)(4)(B), any FOIA requester that resides in the Second Circuit—soon to become the FOIA capital of the U.S.—will be able to bind a federal agency to that court's law. (*See* Clearing House Br. at 6.) Agencies thus will yield to FOIA requests initiated in the Second Circuit, for fear of being saddled with "attorney fees and other litigation costs" should their decision to withhold information be overturned by a federal district court. 5 U.S.C. § 552(a)(4)(E)(i). Finally, any adverse district court ruling would be unlikely to reach this Court, because of the difficulty of obtaining a stay at the district court level to battle controlling precedent. Thus, FOIA cases would become moot long before they could reach this Court.

II. THE SECOND CIRCUIT'S ERRONEOUS "OBTAINED FROM A PERSON" RULING WILL HAVE FAR-REACHING EFFECTS.

A. The Second Circuit Ignored a Long Line of Cases Protecting from Disclosure the Confidential Terms on Which Third Parties Transact with Federal Agencies.

The Solicitor General agrees that the Second Circuit ruled "categorical[ly]" that information "ceases to be information 'obtained from a person' if that information is reflected in the 'agency's own executive actions.'" (SG Br. at 11-12 (quoting 10a).) Indeed, the Solicitor General recognizes that, except for one case erroneously decided by the Western District of New York, district courts have "held that information similar to the identifying information at issue here was 'obtained from a person' within the meaning of Exemption 4." (*Id.* at 12.) The Solicitor General similarly acknowledges that "the D.C. Circuit has applied Exemption 4 to line-item pricing in government contracts even though the prices resulted in part from government action." (*Id.* at 13.) These cases simply cannot be reconciled with the Second Circuit's "categorical" "obtained from a person" ruling.

Fox and Bloomberg primarily argue in opposition that, in some of these other cases, the transacting third parties supplied commercial or financial information in the *application* process leading to the consummated transaction. (*See* Fox Br. at 30-31; Bloomberg Br. at 18-19.) Their

proffered "distinction" is one without a difference, because these courts have indisputably protected from disclosure the *final* terms on which the third parties transacted with the agency, including:

- The *final* terms of line-item prices in government contracts;
- The *final* terms of Export-Import Bank insurance and credit extensions;
- The *final* terms of Treasury bond issuances, including purchaser names and details of bond amounts, coupons, and maturity dates; and
- The *final* terms of National Institutes of Health royalty rates. (*See* Clearing House Br. at 22-26.)

In case there were any doubt about the likely impact of the Second Circuit's ruling, one lower court has *already* applied the Second Circuit's erroneous "obtained from a person" ruling to require the Treasury Department to disclose the name of a commercial bank that applied for funding through an important Treasury lending program. *See Fox News Network, LLC* v. *U.S. Dep't of the Treasury*, --- F. Supp. 2d ----, 2010 WL 3705283 (S.D.N.Y. Sept. 3, 2010). Following *Bloomberg*, this court did not address the Treasury Department's argument that disclosure likely would "'result in substantial competitive harm to the [applicant's] position in the market.'" *Id.* at *36. Instead, the court ordered disclosure on the sole basis that the requested information was not "obtained from a person," because it "'did not come into existence until [Treasury] made the decision to approve the loan

request.'" *Id.* at *37 (quoting *Bloomberg*, 601 F.3d at 148 (alteration in original)).

Finally, no party disputes that the Second Circuit's ruling will have nationwide effects, because FOIA vests jurisdiction in, among other venues, "the district court of the United States in the district in which the complainant resides, or has his principal place of business." 5 U.S.C. § 552(a)(4)(B). (*See* Clearing House Br. at 6.) Thus, every federal agency will be subject to Second Circuit law when a FOIA requester resides or does business in that Circuit, throwing into doubt decades of agency practices protecting the confidentiality of sensitive details concerning completed commercial transactions. On this basis, the Solicitor General successfully petitioned this Court for certiorari in *FCC* v. *AT&T*, arguing that an erroneous ruling from the Third Circuit would "throw[] longstanding FOIA practices and procedures into doubt on a government-wide basis." (Brief for the Petitioner at 28, *FCC* v. *AT&T*, No. 09-1279.) The same is true here.

B. The Second Circuit's Error is Plain and Should be Corrected Now.

The Second Circuit's "obtained from a person" ruling rested "on the mistaken premise that information provided to the government ceases to be information 'obtained from a person' if that information is reflected in the 'agency's own executive actions.'" (SG Br. at 12 (quoting 10a).) The premise is wrong because, as all parties here agree, an agency can withhold information *in its entirety* if, as here, it consists of exempt and non-

exempt data that are "inextricably intertwined." (*See* Clearing House Br. at 27-28 & n.13.)

Instead, Bloomberg argues that, "at most," The Clearing House seeks review over an incorrect "factual determination." (Bloomberg Br. at 20.) But the Second Circuit here broadly held, as a matter of law, that information is no longer "obtained from a person" so long as it is the product of "executive action." (12a.) This is precisely the kind of categorical ruling that merits this Court's review and correction.

III. THIS COURT SHOULD CORRECT THE SECOND CIRCUIT'S ERRONEOUS REJECTION OF THE "PROGRAM EFFECTIVENESS" TEST ADOPTED BY THE D.C. AND FIRST CIRCUITS.

A. The Second Circuit Created a Clear Circuit Split on an Important Question of Federal Law.

The Second Circuit openly rejected the "program effectiveness" test "adopted by the First and District of Columbia Circuits." (13a.) The Solicitor General acknowledges this split (*see* SG Br. at 7, 10, 14-15); so too do Bloomberg and Fox (*see* Bloomberg Br. at 21-22; Fox Br. at 21).

Fox nonetheless contends that this clear split is "shallow and stale" because the D.C. and First Circuits' adoption of the "program effectiveness" test have stood for over three decades and because there is a "dearth" of cases applying this test. (Fox Br. at 21-22.) Bloomberg further argues that the issue has

not sufficiently "percolated" at the appellate level, because "only three Circuit Courts have addressed the issue." (Bloomberg Br. at 26.)

Both Fox and Bloomberg are wrong. That the D.C. and First Circuit decisions endorsing the "program effectiveness" test are longstanding supports this Court's grant of certiorari. There is no "dearth" of law; only *settled* law applying these tests to discrete government programs that depend on assuring third parties that details of their transactions will remain confidential.

For this reason, Bloomberg's suggestion that this Court should await additional Circuit decisions is meritless, particularly when this split is between the two most important Circuits on FOIA law. *See, e.g., Nat'l Assoc. of Greeting Card Publishers* v. *U.S. Postal States Serv.*, 462 U.S. 810, 820 (1983) (grant of certiorari "[b]ecause of the inconsistencies in the holdings of the Second and District of Columbia Circuits").

B. The Clearing House has "Standing" to Correct the Second Circuit's Erroneous Rejection of the "Program Effectiveness" Test.

Fox also erroneously maintains that The Clearing House lacks "standing"[2] to correct the

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[2] Neither the Solicitor General nor Bloomberg (which unsuccessfully challenged The Clearing House's standing in the District Court) challenge The Clearing House's standing. Only Fox does so, in a footnote that recycles its arguments—rejected by the Second Circuit—suggesting that The Clearing House

(footnote continued)

Second Circuit's erroneous rejection of the "program effectiveness" test. (Fox Br. at 24.) Unlike the cases cited by Fox, The Clearing House is not *raising* an interest that the government has not itself asserted. The Federal Reserve Board has consistently taken the position, at both the administrative and judicial levels, that disclosure of the requested information would harm its lending programs and its statutory missions. The Solicitor General endorses this position on the merits now (*see* SG Br. at 14-17), and presumably would do so again if this Court accepts certiorari.

Moreover, unlike the *exclusive* government interests at issue in Fox's cases, the program effectiveness test is not "designed to protect interests of the government *only*." *Sears, Roebuck & Co.* v. *Gen. Servs. Admin.*, 384 F. Supp. 996, 1004 (D.D.C. 1974) (emphasis added). This test merges

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(footnote continued)
must name those members who borrowed from the Discount Window, and that The Clearing House failed to particularize the harm from disclosure of the requested information. Fox's first argument fails, because, in a declaration provided to the Second Circuit, The Clearing House stated—unequivocally—that certain of its members *have* borrowed from the Discount Window during the time periods covered by Fox's request. *See Bldg. & Constr. Trades Council of Buffalo, N.Y. & Vicinity* v. *Downtown Dev.*, 448 F.3d 138, 145 (2d Cir. 2006) (no requirement that an association "'name names'" in order "properly to allege injury in fact to its members."). Fox's second argument fails, because the record contains detailed assertions of the harm likely to befall borrowing institutions should the requested documents be disclosed. (*See* Clearing House Br. at 9-11.)

Exemption 4's twin aims of protecting both the interests of "the Government and the individual," *Nat'l Parks & Conservation Ass'n* v. *Morton*, 498 F.2d 765, 767 (D.C. Cir. 1974), because third parties have an interest in advancing—and continuing to benefit from—the government programs threatened by disclosure of their sensitive commercial information.

C. The Second Circuit Erred in Rejecting the "Program Effectiveness" Test.

The Solicitor General agrees that the program effectiveness test furthers Exemption 4's purposes "by protecting sensitive commercial or financial information about participants in government loan, grant, and licensing-type programs where disclosure would demonstrably undermine the basic objectives of those programs." (SG Br. at 15.) The Solicitor General also agrees that the Second Circuit "mistakenly concluded" that this test was "the 'functional equivalent' of the 'public interest' standard for withholding under Exemption 5," which was rejected by this Court in *FOMC* v. *Merrill* due to concerns that are not present here. (SG Br. at 16.)

Fox and Bloomberg make no reasoned efforts to refute these points, quoting primarily from *Merill*, and the Second Circuit's erroneous reliance on it, without explaining how the program effectiveness test represents the same kind of unbounded expansion asserted by the agency in *Merrill*. (Fox Br. at 34-35; Bloomberg Br. at 22-23.)

CONCLUSION

The petition for a writ of certiorari should be granted.

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IN THE

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THE CLEARING HOUSE ASSOCIATION L.L.C.,

Petitioner,

—v.—

BLOOMBERG L.P. and THE BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM,

Respondents.

On Petition For Writ of Certiorari to the United States Court of Appeals for the Second Circuit

MOTION FOR LEAVE TO FILE OUT OF TIME BRIEF OF AMERICAN BANKERS ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE

Amicus Curiae American Bankers Association (ABA) respectfully submits this motion pursuant to Supreme Court Rule 37.2(b) seeking leave to file the attached brief in support of Petitioner the Clearing House Association, L.L.C., and states as follows:

The ABA is the principal national trade association of the banking industry in the United States. Its members are located in each of the 50 States and the District of Columbia. ABA members hold a substantial majority of domestic assets of the banking industry of the United States.

The ABA and its members support the Clearing House Association's petition because they have a direct interest in the outcome of this case. FOIA provides the framework within which the public may request the release of information from the various agencies of the federal government, including the agencies and departments that have been tasked with the oversight and regulation of the nation's banking industry. The Second Circuit's opinion interprets FOIA in a manner that, if allowed to stand, could serve as precedent to compel the public release of heretofore confidential documents or information in the possession of federal bank regulators. This result is at odds with the purpose of the exemptions to disclose that were enacted as an integral part of FOIA and, if allowed to stand, the precedent could prove damaging to both the public interest and the interest of ABA's members.

The proposed amicus brief by the ABA meets the standards for acceptance set by Rule 37 as it will draw the Court's attention to relevant matter not already brought to the Court's addition by the parties. The ABA brief summarizes in a sufficient fashion the reasons behind the confidential treatment of sensitive Federal Reserve documents and the deleterious impact that the release of such materials could have upon the public's confidence in individual banking institutions.

All parties, with the sole exception of Bloomberg, L.P., have consented to the filing of an amicus by the ABA.

Wherefore, amicus American Bankers Association seeks the Court's leave to file the attached brief in support of Petitioner the Clearing House Association L.L.C.

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INTRODUCTION[1]

L. William Seidman, the former Chairman of the Federal Deposit Insurance Corporation (FDIC), once observed that "[o]ur whole financial system runs on confidence and not much else when you get down to it... [w]hat we've learned is that when confidence erodes, it erodes very quickly."[2] Recent events have amply demonstrated the essential truth of Chairman Seidman's remarks. Over the past 24 months the nation has watched as the number of bank failures has climbed to levels not seen since the thrift and banking crisis of the late 1980's. In 2009 alone, the FDIC was appointed receiver for 140 insured depository institutions.[3] Yet despite the increase in the number of failures within the

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[1] Pursuant to Rule 37.2(a), all counsel of record received notice of intent to file the amicus brief at least 10 days prior to its filing. Counsel for The Clearing House Association and the Solicitor General have consented to the filing of this amicus. Counsel for Bloomberg, however, does not consent. Counsel certifies that no counsel for any party authored this brief either in whole or in part, and no person or entity, other than ABA and its members, made a monetary contribution to the preparation or submission of the brief.

[2] Lohr, Steve, *When A Big Bank Went Under, U.S. Presence Stemmed the Panic*, New York Times (February 18, 1991). Available at http://www.nytimes.com/1991/02/18/business/when-a-big-bank-went-under-us-presence-stemmed-the-panic.html

[3] FDIC, *Bank Failures In Brief*: http://www.fdic.gov/bank/historical/bank/2009/ (retrieved on December 15, 2010).

banking industry, the public's fundamental confidence in the depository institutions with which they entrust their funds has remained intact.

Unlike the Great Depression of the 1930's or earlier bank "panics," the country has largely been spared images of frightened depositors lining up outside of financial institutions in order to withdraw their money, despite the troubled economy. This reassuring evidence of the public's belief in the fundamental resiliency of our nation's banking system should not be the cause for complacency, however. Maintaining public confidence in our nation's banking institutions is just as important now as it has been in the past. In the isolated instances where depositor or investor confidence in an institution has eroded, the correctness of Chairman Seidman's observations has been validated.

Very recent history amply demonstrates that, despite the existence of federal deposit insurance and other systemic protections, bank "runs" can still occur; depositors and investors will still flee institutions that they believe to be moribund, in most cases making the eventual collapse of the institution inevitable.[4] Bank runs have played a

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[4] Of the ten largest banks/thrifts (based on asset size) to either receive FDIC open bank assistance or to be placed in receivership, depositor runs occurred at five institutions:

- Washington Mutual Bank (the largest institution handled by the FDIC to date),
- Continental Illinois National Bank & Trust (open bank assistance)

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role in two of the three largest failures in our history – IndyMac Bank in California and Washington Mutual in the state of Washington. Both collapses were precipitated in part by a loss of public confidence, fueled by negative press reports, which resulted in massive withdrawals of funds by depositors. Both failures are of recent vintage, each occurring in 2008.

While depositor runs are thankfully rare even in these financially difficult times, it is nevertheless appropriate to consider the potential fallout that can result when agencies of the federal government are compelled to disclose documents and information that may, in the public's mind, be used

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(...continued)

- IndyMac Federal Savings Bank
- First Republic Bank – Dallas N.A. (open bank assistance),
- Bank of New England N.A.

See, FDIC's *Historical Statistics on Banking (HSOB); OTS Fact Sheet on Washington Mutual Bank*, available at http://files.ots.treas.gov/730021.pdf; Grind, Kirsten, *The Downfall of Washington Mutual*, Puget Sound Business Journal (September 25, 2009), available at http://seattle.bizjournals.com/seattle/stories/2009/09/28/story1.html?page=1; Federal Deposit Insurance Corporation, *Managing The Crisis: the FDIC and RTC Experience* at 547, 598 (1998), available at http://www.fdic.gov/bank/historical/managing/history2-04.pdf and http://www.fdic.gov/bank/historical/managing/history2-06.pdf; Federal Deposit Insurance Corporation, *History of the Eighties—Lessons for the Future: An Examination of the Banking Crisis of the 1980s and Early 1990s*, at 375 (1997), available at http://www.fdic.gov/bank/historical/history/337_378.pdf.

to infer the health, prospects, and borrowing activities of specific financial institutions. Bank regulators are in a unique and powerful position to shape the public's perception of the institutions that they regulate, and the process of effective bank supervision depends in part upon the ability of the regulators and the institutions that they regulate to engage in a frank exchanges of information that are, by any reasonable commercial standard, confidential. Ill-considered disclosures or statements by a regulator can shake the public's confidence in even a robustly healthy bank, or place that institution at a competitive disadvantage vis-à-vis its peers, with unfortunate consequences.

This case is significant in that the decision below challenges the long-standing presumption that the *Freedom of Information Act* (FOIA) does not require banking regulators to disclose confidential regulatory information about a financial institution under its supervision. As discussed herein, the Court should grant the Clearing House Association's petition for a writ of certiorari so it may reverse the Second Circuit's decision, which will undermine the clear and longstanding policy exempting sensitive bank regulatory materials from disclosure under FOIA.

In submitting this amicus, the ABA acknowledges that Congress has not been idle with regard to setting the parameters for *future* disclosures by the Federal Reserve (and the Reserve Banks) of Discount Window borrowing and other

similar transactions. Under the recent *Dodd–Frank Wall Street Reform and Consumer Protection Act*[5], the Federal Reserve will be required in the future to disclose the identities of banks that borrow from the Discount Window, along with other transaction level details of their borrowing. The ABA submits that review should nevertheless be granted because (1) the recent legislation does not moot the current dispute, (2) the issue is still ripe as the Second Circuit's construction of FOIA may be used to undermine the long-standing presumption against disclosure of sensitive documents in future litigation, and (3) the *Dodd-Frank* amendments do not abate the potential harm to the industry that could result from the present disclosures.

STATEMENT OF INTEREST OF AMICUS CURIAE

The American Bankers Association ("ABA") is the principal national trade association of the financial services industry. The ABA's headquarters are located in Washington, DC. Its members, located in each of the fifty states, the District of Columbia, and Puerto Rico, include financial institutions of all sizes. ABA members hold a majority of the domestic assets of the banking industry in the United States.

The ABA and its members support the Clearing House Association's petition because they

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[5] Pub. L. No. 111 – 203, § 1103, 124 Stat. 1376 (2010).

have a direct interest in the outcome of this case. FOIA provides the framework within which the public may request the release of information from the various agencies of the federal government, including the agencies and departments that have been tasked with the oversight and regulation of the nation's banking industry. The Second Circuit's opinion interprets FOIA in a manner that, if allowed to stand, could serve as precedent to compel the public release of heretofore confidential documents or information in the possession of federal bank regulators. This result is at odds with the purpose of the exemptions to disclosure that were enacted as an integral part of FOIA and, if allow to stand, the precedent could prove damaging to both the public interest and the interest of ABA's members.

ARGUMENT

The ABA strongly concurs with the arguments articulated by the Clearing House Association in support of its petition. The ABA agrees that the disclosure of documents that reveal the identity of institutions that borrowed from the "emergency" lending facilities offered by the Federal Reserve and the Federal Reserve Banks during the recent financial crisis should be shielded from disclosure under FOIA.

In crafting FOIA, Congress made it very clear that it did not intend for the statute to be used to compel the release of documents or information in the possession of a bank regulator that have the

potential to destabilize a financial institution or will frustrate the implementation of federal programs that are designed to promote and protect the safety and soundness of the financial system.

A. FOIA Should Not Be Interpreted In A Manner That Will Undermine The Acknowledged Purpose Of Exemption 8.

At the time of the passage of the *Freedom of Information Act* in 1966, Congress was fully cognizant of what a loss of public confidence could do - and do very quickly – to a depository institution. Mindful that opening up the process of regulating financial institutions to the public would create unacceptable risks for banking industry and make effective supervision of the banking system much more difficult, Congress enacted exemptions to FOIA that excuse the disclosure of information in the government's possession that has the potential to destabilize a financial institution or chill the necessary candor and cooperation that should exist between a bank and its regulators.

Exemption 8 of FOIA protects from disclosure information that is "contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions."[6] Courts construing this provision have identified two major reasons for excluding this category of documents from routine

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[6] 5 U.S.C. § 552(b)(8) (2006).

public disclosure: to preserve the public's confidence in banking institutions that could be eroded by a disclosure of regulatory documents, and to ensure the continued candor and cooperation of banks with their regulators. The United States Circuit Court for the District of Columbia Circuit concluded that

> [T]he primary reason for adoption of Exemption 8 was to insure the security of financial institutions. Specifically, there was concern that disclosure of examination, operation, and condition reports containing frank evaluations of the investigated banks might undermine public confidence and cause unwarranted runs on banks.... Furthermore, a secondary purpose in enacting Exemption 8 appears to have been to safeguard the relationship between the banks and their supervising agencies. If details of the bank examinations were made freely available to the public and to banking competitors, there was concern that banks would cooperate less fully with federal authorities.

Consumers Union of United States, Inc. v. Heimann, 589 F.2d 531, 534 (D.C. Cir. 1978)(footnotes omitted).[7] The D.C. Circuit

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[7] *See,* H. Rep. No. 1497, 89th Congress, 2nd Session, House Committee on Government Operations (May 9, 1966) (S. 1160) at 32 ("This exemption is designed to insure the security and integrity of financial institutions, for the sensitive details

(continued...)

subsequently expanded upon its discussion in *Consumers Union* when it stated that "(i)t is clear from the legislative history that the exemption was drawn to protect not simply each individual bank but the integrity of financial institutions as an industry." *Gregory v. Federal Deposit Insurance Corporation*, 631 F.2d 896, 898 (D.C.Cir.1980) (citations omitted).[8]

(...continued)
collected by Government agencies which regulate these institutions could, if indiscriminately disclosed, cause great harm").

[8] *See Nat'l Cmty. Reinvestment Coal. v. Nat'l Credit Union Admin.*, 290 F. Supp. 2d 124, 135-36 (D.D.C. 2003) (affirming that two purposes of Exemption 8 are "to safeguard public confidence . . . which could be undermined by candid evaluations of financial institutions" and "to ensure that [banks] continue to cooperate . . . without fear that their confidential information will be disclosed"); *Feinberg v. Hibernia Corp.*, No. 90-4245, 1993 WL 8620, at *4 (E.D. La. Jan. 6, 1993) (noting Exemption 8's dual purpose of protecting operation and condition reports containing frank evaluations of investigated banks, and protecting relationship between financial institutions and supervisory government agencies) (non-FOIA case); *Atkinson v. FDIC*, No. 79-1113, 1980 WL 355660, at *1 (D.D.C. Feb. 13, 1980) (recognizing Exemption 8's purposes of protecting security of financial institutions and "promot[ing] cooperation and communication between bank employees and examiners"), *appeal dismissed*, No. 80-1409, 1980 WL 355810, at *1 (D.C. Cir. June 12, 1980); *Berliner, Zisser, Walter & Gallegos v. SEC*, 962 F. Supp. 1348, 1353 (D. Colo. 1997) (delineating Exemption 8's "dual purposes" as "protecting the integrity of financial institutions and facilitating cooperation between [agencies] and the entities regulated by [them]"). *See also Fagot v. FDIC*, 584 F. Supp.
(continued...)

Courts construing Exemption 8 have treated it as a broad and all-inclusive exclusion from disclosure. The D.C. Circuit has opined that "if Congress has intentionally and unambiguously crafted a particularly broad, all-inclusive definition, it is not [the courts'] function, even in the FOIA context, to subvert that effort." *Consumers Union of United States, Inc.*, 589 F.2d at 533. As another court has stated, "Exemption 8 was intended by Congress -- and has been interpreted by courts -- to be very broadly construed," *Pentagon Fed. Credit Union v. Nat'l Credit Union Admin.*, No. 95-1475, 1996 U.S. Dist. LEXIS 22841, at *11 (E.D. Va. June 7, 1996).

Consistent with this broad construction, courts have extended the coverage of Exemption 8 to protect a wide variety of agency materials that are "related to" but do not technically qualify as "reports of examination."[9] For example, the Fifth Circuit has held that Exemption 8 also protects agency materials that are only indirectly related to a bank examination such as an "Order of Investigation" – a strictly internal agency document that formally commences an administrative investigation by the

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1168, 1173 (D.P.R. 1984) (recognizing purposes of Exemption 8 in protecting information containing frank evaluations which might undermine public confidence and relationship between financial institutions and supervisory agencies), *aff'd in pertinent part & rev'd in part*, 760 F.2d 252 (1st Cir. 1985) (unpublished table decision).

[9] *Atkinson*, 1980 WL 355660, at *1-2.

agency into unsafe practices or violations of law or regulation at an institution.[10]

Indeed, a number of decisions regarding the disclosure of sensitive regulatory documents or information outside of a FOIA setting have considered (and been guided by) the desire to protect the stability of depository institutions and the effectiveness of the regulatory process enunciated by Congress in its adoption of Exemption 8. For example, in *In re: Verrazzano Towers,* the court declined to enforce a third-party litigation subpoena directed to the FDIC seeking to compel the release of "all orders, directives, correspondence, memoranda" relating to the Flushing Savings Bank and its involvement with mortgages, joint ventures and other land dealings. Recognizing that while FOIA had "no direct application" to the enforcement of a subpoena in litigation, the court was nevertheless persuaded that the disclosure of documents that reflect the regulation and operation of a financial institution raised the same policy concerns addressed by Congress's adoption of Exemption 8, and declined to compel the production:

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[10] *Abrams v. U.S. Dept. of Treasury*, 243 Fed. Appx. 4, 6 (5th Cir. 2007) (rejecting plaintiff's argument that Order of Investigation must directly relate to content of bank examination report, finding instead that "statute never mentions contents, and only requires that a matter be related to the Report in order to be exempt from production").

> [T]he rationale behind exemption 8 is clearly analogous to any policy supporting the official information privilege claimed by the FDIC. It is presumed that revelation under FOIA of information in the possession of federal banking agencies such as the FDIC might produce harmful results for the banking industry and the supervising agencies. It then seems clear that disclosure of the same types of records to private parties in the course of litigation could have similar undesired effects.

In re Verrazzano Towers, 7 B.R. 648, 652 (Bankr.E.D.N.Y. 1980). *See also, In re Knoxville News-Sentinel Co.*, 723 F.2d 470, 476 (6th Cir. 1983) (citing Exemption 8 as support for conclusion that agency's questioning of bank employees is to be shielded from civil discovery).

While it is true that Exemption 8 was not raised administratively as a bar to disclosure in this case, the ABA respectfully submits that it makes very little sense to compel the release agency documents under FOIA that would create the same potential for the type of harm that Congress expressly sought to avert when it adopted Exemption8.[11] There is a sufficient similarity

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[11] The ABA submits that the District Court in *Fox News Network v. Board of Governors of the Federal Reserve System*, correctly analyzed the situation when it concluded that the disclosure of Federal Reserve materials could potentially cause

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between the type of information that would be conveyed by the Federal Reserve's Remaining Term Report and a Report of Examination prepared by a chartering authority to support such a conclusion: both capture confidential aspects of bank operations, and both are treated by analysts and the industry as providing a measure of the financial health of an institution. It would be paradoxical to compel the release of sensitive documents belonging to a federal banking regulator based on an analysis of FOIA Exemptions 4 or 5 when the disclosure could clearly cause the very harm that Congress expressly sought to prevent when it adopted Exemption 8.

B. The Transactions In Question Were Undertaken Based On The Well-Settled

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(...continued)
great harm and a loss of public confidence in the banking industry:

> The Board's concerns, that rumors are likely to begin and runs on banks are likely to develop, cannot be dismissed. Similarly, the Board's concern is real that disclosure would reveal proprietary trading information of borrowers, their trading strategies and the size and nature of their portfolios of assets. The national economy is not so out of danger, and the frailty of banks so different now than when their Discount Window borrowing began, as to make the Board's concern academic.

639 F. Supp. 2d 384, 401 (S.D.N.Y. 2009), *vacated and remanded*, 601 F.3d 158 (2d Cir. 2010).

Expectation That They Would Remain Confidential.

The ABA also concurs with the Clearing House Association's argument (at 6) that the Court should grant review because the Second Circuit's decision will disrupt the Federal Reserve's "long-established procedures" which establish that Discount Window borrowing will remain confidential. *Cf. Renegotiation Bd.* v. *Bannercraft Clothing Co.*, 415 U.S. 1, 11 (1974) (grant of certiorari to analyze "the impact of the FOIA upon long-established procedures of the Renegotiation Board"). Indeed, the institutions that availed themselves of the Federal Reserve lending facilities did so in reliance upon the government's long-standing assurance that the transaction would remain confidential. [12] For these institutions, there is an element of surprise and unfairness in the Second Circuit's decision.

The reason for this policy of treating Discount Window transactions as confidential is easily explained: while healthy financial institutions frequently borrow from Federal Reserve Banks for ordinary operational reasons, there is nevertheless a stigma attached to borrowing from the Discount Window or other similar facility. The stigma arises

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[12] *See* Brian F. Madigan & William R. Nelson, *Proposed Revision to the Federal Reserve's Discount Window Lending Program*, 88 Fed. Res. Bull. 313, 315 (2002)(The Federal Reserve has long held "information about borrowing by individual banks in the strictest confidence.").

from the fact that Federal Reserve Banks act as "lenders of last resort" to depository institutions and primary dealers that are unable to secure funding from market sources on a short term basis. Because of the stigma associated with accessing the Discount Window, banks have been reluctant to access this lending facility. [13]

The equitable necessity for honoring the Federal Reserve's assurances of confidentiality is easy to understand; many institutions that entered into Discount Window transactions during the relevant period covered by this case would not have done so absent the Federal Reserve's longstanding assurance of confidentiality.

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[13] Federal Reserve Chairman Ben Bernanke has stated that the reluctance of banks to seek necessary funding from the Discount Window has hampered the effectiveness of the program, and that reluctance stems from the "stigma" associated with having to borrow from the Federal Reserve:

> [T]he efficacy of the discount window has been limited by the reluctance of depository institutions to use the window as a source of funding. The "stigma" associated with the discount window, which if anything intensifies during periods of crisis, arises primarily from banks' concerns that market participants will draw adverse inferences about their financial condition if their borrowing from the Federal Reserve were to become known.

Bernanke, Ben, *Remarks Via Satellite at the Federal Reserve Bank of Atlanta Financial Markets Conference: Liquidity Provision by the Federal Reserve* (May 13, 2008) available at http://www.federalreserve.gov/newsevents/speech/bernanke20080513.htm.

Finally, the ABA acknowledges that Congress has not been idle with regard to setting the parameters for *future* disclosures by the Federal Reserve (and the Reserve Banks) of Discount Window borrowing and other similar transactions. Under the recent *Dodd–Frank Wall Street Reform and Consumer Protection Act*[14], the Federal Reserve will be required in the future to disclose the identities of banks that borrow from the Discount Window, along with other transaction level details of their borrowing. The disclosure is subject to a two-year waiting period after the borrowing occurs.

The ABA submits that review should nevertheless be granted. First, the *Dodd-Frank* amendments to the Federal Reserve's disclosure procedures do not moot this appeal as they expressly carve out litigation initiated prior to the enactment of the statute. Second, the issue is still ripe as the Second Circuit's construction of FOIA may be used to undermine the long-standing presumption against disclosure with respect to other types of documents or information in the possession of the regulators, not just information pertaining to the details of Discount Window transactions. Third, the *Dodd-Frank* amendments do not abate the potential harm to the industry that could result from the present disclosures. As noted by the Clearing House Association in its brief (at 4, 11-12), disclosure of the borrowing patterns of individual

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[14] Pub. L. No. 111 – 203, § 1103, 124 Stat. 1376 (2010).

banking institutions during the recent financial crisis may cause depositors and the investing public to draw inferences—whether justified or not—that could affect their confidence in the current financial condition of the affected institutions.

CONCLUSION

For the foregoing reasons, the ABA urges the Court to grant the Clearing House Association's petition for a writ of certiorari.

Respectfully submitted,

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